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No. 497

IN THE

Supreme Court of the United States

October Term, 1964

JOHN RUFFALO, JR.,

Petitioner,

v.

MAHONING COUNTY BAR ASSOCIATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Petitioner prays that a writ of certiorari issued to review the judgment of the Supreme Court of Ohio, entered in the above-entitled case on May 20, 1964, and as to which rehearing was denied on June 24, 1964.

CITATION TO OPINIONS BELOW

The opinion of the Supreme Court of Ohio, printed in Appendix A hereto, p. 33 below, is reported at 176 Ohio St. 263, 199 N.E.2d 396. The opinion of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio is unreported. The relevant portions of the opinion are printed in Appendix A, p. 25 below.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on May 20, 1964. A timely petition for rehearing, filed June 3, 1964, was denied on June 24, 1964. The judgment is final, and is from the highest court of the state. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3), since petitioner claims rights, privileges, and immunities under the Constitution and statutes of the United States.

QUESTIONS PRESENTED

1. Does suspension of a lawyer from the practice of law because he has made occasional advances of funds to needy clients in cases under the Federal Employers' Liability Act deny to such lawyer, or the class of clients he represents, rights, privileges, or immunities protected by the Federal Employers' Liability Act or by the Fourteenth Amendment to the Constitution of the United States?

2. Does suspension of a lawyer from the practice of law because he has had in his employ, to assist him in prosecution of cases under the Federal Employers' Liability Act, an investigator who was also employed in a different capacity by a railroad, deny to such lawyer, or the class of clients he represents, rights, privileges, or immunities protected by Section 10 of the Federal Employers' Liability Act or by the Fourteenth Amendment to the Constitution of the United States?

3. Does suspension of a lawyer from the practice of law on the basis of a judicial construction of the canons of ethics which could not fairly have been anticipated deny to such lawyer the right to pursue his calling without due process of law, in contravention of the Four-

teenth Amendment to the Constitution of the United States?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XIV, § 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Code, Title 45, § 55: Any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided,* That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

United States Code, Title 45, § 60, ¶ 1: Any contract, rule, regulation, or device whatsoever, the purpose, intent, or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to a person in interest as to the facts incident to the injury or death of any employee, shall be

void, and whoever, by threat, intimidation, order, rule, contract, regulation, or device whatsoever, shall attempt to prevent any person from furnishing voluntarily such information to a person in interest, or whoever discharges or otherwise disciplines or attempts to discipline any employee for furnishing voluntarily such information to a person in interest, shall, upon conviction thereof, be punished by a fine of not more than $1,000 or imprisoned for not more than one year, or by both such fine and imprisonment, for each offense: *Provided,* That nothing herein contained shall be construed to void any contract, rule, or regulation with respect to any information contained in the files of the carrier, or other privileged or confidential reports.

Rules of Practice of the Supreme Court of Ohio, Rule XXVII(5) (167 Ohio St. lxxviii): Misconduct, as the term is used herein, shall mean any violation of any provision of the oath of office taken upon admission to practice of law in this state, or any violation of the Canons of Professional Ethics or the Canons of Judicial Ethics as adopted by the Court from time to time, or the commission or conviction of a crime involving moral turpitude.

*Rules of Practice of the Supreme Court of Ohio, Rule XXVIII, § 1 (*167 Ohio St. lxxxiv): These rules of professional conduct shall be binding upon all members admitted to practice law in the State of Ohio, and the wilful breach thereof shall be punished by reprimand, by suspension or by disbarment, as provided in Rule XXVII of the Rules of Practice.

The Canons of Professional Ethics and the Canons of Judicial Ethics of the American Bar Association are adopted; and nothing in these rules is intended to

limit or supersede any provision of law relating to the duties and obligations of attorneys or the consequences of a violation thereof. (The Canons of Professional Ethics were adopted, November 13, 1952. The Canons of Judicial Ethics were adopted January 27, 1954.)

Canons of Professional Ethics of the American Bar Association, Canon 10: The lawyer should not purchase any interest in the subject matter of the litigation which he is conducting.

Canons of Professional Ethics of the American Bar Association, Canon 29: Lawyers should expose without fear or favor before the proper tribunals corrupt or dishonest conduct in the profession, and should accept without hesitation employment against a member of the Bar who has wronged his client. The counsel upon the trial of a cause in which perjury has been committed owe it to the profession and to the public to bring the matter to the knowledge of the prosecuting authorities. The lawyer should aid in guarding the Bar against the admission to the profession of candidates unfit or unqualified because deficient in either moral character or education. He should strive at all times to uphold the honor and to maintain the dignity of the profession and to improve not only the law but the administration of justice.

Canons of Professional Ethics of the American Bar Association, Canon 32: No client, corporate or individual, however powerful, nor any cause, civil or political, however important, is entitled to receive nor should any lawyer render any service or advice involving disloyalty to the law whose ministers we are, or disrespect of the judicial office, which we are bound to uphold, or corruption of any person or persons exercising a public office or private trust, or deception or

betrayal of the public. When rendering any such improper service or advice, the lawyer invites and merits stern and just condemnation. Correspondingly, he advances the honor of his profession and the best interests of his client when he renders service or gives advice tending to impress upon the client and his undertaking exact compliance with the strictest principles of moral law. He must also observe and advise his client to observe the statute law, though until a statute shall have been construed and interpreted by competent adjudication, he is free and is entitled to advise as to its validity and as to what he conscientiously believes to be its just meaning and extent. But above all a lawyer will find his highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest man and as a patriotic and loyal citizen.

Canons of Professional Ethics of the American Bar Association, Canon 42: A lawyer may not properly agree with the client that the lawyer shall pay or bear the expenses of litigation; he may in good faith advance expenses as a matter of convenience, but subject to reimbursement.

STATEMENT OF THE CASE

Respondent association brought 14 charges of professional misconduct against petitioner. Seven of the charges dealt with solicitation, and the other seven with other forms of alleged misconduct. Extended hearings were held by a three-man panel of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio. The panel found, and the Board agreed, that the evidence failed to establish six of the seven charges of solicitation, and it dismissed one other

charge as insufficient in law. The panel, and the board, found the petitioner guilty on one of the charges of solicitation and on six other charges, and recommended his disbarment. The Supreme Court of Ohio, which has responsibility both for determining the facts and for deciding what action should be taken on the basis of those facts, was in disagreement as to whether the facts were as found by the panel and the board on five of the seven charges. It found him guilty of professional misconduct on two of the charges, and ordered his indefinite suspension from the practice of law. Under Rule XXVII (21)-(26) of the Supreme Court of Ohio, an attorney who has been indefinitely suspended may petition for reinstatement after two years have elapsed, and may then be reinstated if he establishes by clear and convincing evidence that he has rehabilitated himself, and that he has the qualifications, mental, educational, and moral, which would have been a requirement of an applicant for admission to the bar at the time of his original admission, and if he successfully passes a bar examination.

As to the two charges on which petitioner was found guilty of misconduct by the Supreme Court of Ohio, charges 8 and 13, there is no factual dispute. In charge 8 it was alleged that petitioner advanced monies to Clara E. Beighley, Naomi Clark, and Sam Cotellesse while handling their claims, and deducted such advances from settlements of their claims. No evidence was adduced with regard to Sam Cotellese and that portion of the charge was stricken by the panel. It is not disputed that petitioner advanced Mrs. Beighley $1025 over a period of four years, and that he advanced Mrs. Clark $711 over a period of three-and-one-half years. These advances were made at various times, beginning some months after these ladies had

retained petitioner, and were made at the request of the clients to pay living expenses. The amount of such advances was deducted from the settlements obtained in these cases, although these clients received other funds, by way of insurance or payments under the Railroad Retirement Act, which would have been sufficient to repay the advances even if nothing had been obtained in settlement of their claims. Both Mrs. Beighley and Mrs. Clark were widows of railroad employees, and their claims were under the Federal Employers' Liability Act, 45 U.S.C. §§ 51 et seq. Petitioner testified that he did not offer to advance money to these clients in order to obtain their lawsuits (Tr. 729-734), and there was no evidence to the contrary with regard to this. The Supreme Court of Ohio, overruling to the extent of any inconsistency four prior Ohio decisions, held that these advances violated Canons 10 and 42 of the American Bar Association, which have been adopted by rule in Ohio.

Charge 13 alleged that petitioner conspired with one Michael Orlando and paid Orlando money for preparing lawsuits against the Baltimore & Ohio Railroad which was Orlando's employer. It is undisputed that from 1957 until July 19, 1961, Orlando worked for petitioner as an investigator, and that during that period, and until July 21, 1961, he was a "car bleeder" for the Baltimore & Ohio.* Orlando investigated all of petitioner's railroad cases, interviewing witnesses and advising petitioner on technicalities of railroading. Orlando was paid $25 a day and expenses by the petitioner, and, during the more than four years he was

*Although the board and the court below speak of 1962, it is clear that Orlando's employment with petitioner and with the railroad ceased in 1961, as alleged in the complaint and as shown by the undisputed testimony. (Tr. 625.)

employed as an investigator, earned $13,983.62 for such services. Orlando was paid in cash, and only such records of payments as were necessary for the Internal Revenue Service were kept.

On these facts, the Supreme Court of Ohio found that one who believes that it is proper to employ and pay another to work against the interests of his regular employer is not qualified to be a member of the Ohio bar. The Board of Commissioners had held that such conduct violated Canons 29 and 32 of the American Bar Association, but the Supreme Court of Ohio did not indicate which canons, if any, it thought had been violated. The panel, the board, and the court all specifically rejected the contention that § 10 of the Federal Employers' Liability Act, 45 U.S.C. § 60, permitted such employment of Orlando by petitioner.

It was agreed by the parties and by the hearing panel that all legal objections to the charges against petitioner could be raised in the brief to be filed with the panel and the board. Petitioner's claim that to find him guilty on Charge 8 would defeat the policy of the Federal Employers' Liability Act was so asserted in his brief filed with the panel and the board, renewed in his Objections to the Report of the Board filed with the Ohio Supreme Court, and refined, in the light of the intervening decision in *Brotherhood of Railroad Trainmen* v. *Virginia ex rel Virginia State Bar*, 377 U.S. 1 (1964), in his petition for rehearing. Petitioner's constitutional arguments were stated in his Objections to the Report of the Board, and preserved in his motion for rehearing. These federal claims were accepted by a dissenting judge, 176 Ohio St. at 272-275, 199 N.E.2d at 402-404, but rejected sub silentio by the majority of the court. The excerpts from the

record showing raising of these federal claims are set out in Appendix B hereto, p. 51 below.

Petitioner's federal objections to charge 13 were timely asserted before the panel, the board, and the court below, but the parts of the record dealing with this are not reprinted in the appendix since the Supreme Court of Ohio expressly rejected such claims. 176 Ohio St. at 268, 199 N.E.2d at 400.

Question Three of the Questions Presented here, that petitioner has been suspended on the basis of a judicial construction of the canons of ethics which could not fairly have been anticipated, came into the case for the first time when the Supreme Court of Ohio, overruling four of its earlier decisions, gave the relevant canons an interpretation never before adopted by it or any other court. It could, therefore, first have been raised in the petition for rehearing, and was so raised, as set forth in Appendix B hereto, p. 53 below.

REASONS FOR GRANTING THE WRIT

1. *The decision below inhibits enforcement of rights under a federal statute.* This Court need not be told that the Federal Employers' Liability Act, 45 U.S.C. §§ 51 *et seq.*, is a federal statute of importance. Whether railroad employees would be better off under a system of workmen's compensation is not for this Court to decide. Congress has chosen to provide for such employees, and their widows and orphans, a lawsuit rather than an administrative remedy. Whatever springes Ohio may set for those who are endeavoring to assert rights that the state confers, claimants under FELA are not to be prevented from putting forward their claim by local oddities. As Ohio well knows,

"only if federal law controls can the federal Act be given that uniform application throughout the country essential to effectuate its purposes." *Dice* v. *Akron, C. & Y. R. Co.*, 342 U.S. 359, 361 (1952). This principle is specifically applicable to disciplinary actions against lawyers. "A State could not, by invoking the power to regulate the professional conduct of attorneys, infringe in any way the right of individuals and the public to be fairly represented in lawsuits authorized by Congress to effectuate a basic public interest." *Brotherhood of Railroad Trainmen* v. *Virginia ex rel Virginia State Bar*, 377 U.S. 1, 7 (1964). On this principle it has been held no defense to a stockholders' action to recover short-swing profits that the suit was champertous, for "the public policy of New York cannot nullify this federally created right, established for the effectuation of a broad federal policy." *Magida* v. *Continental Can Co., Inc.*, 231 F.2d 843, 848 (2d Cir. 1956). And a contingent fee contract has been held proper in a Jones Act case even in a state which refuses to permit contingent fees in state-created litigation. *Greenberg* v. *Panama Transport Co.*, 185 F.Supp. 320, 324 (D.Mass. 1960).

The court below held that petitioner was guilty of misconduct in making occasional modest advances to widows, while their FELA claims were pending, for living expenses. It will be seen under Point 2 of this petition that such a holding is contrary to that of every court which has spoken on the question. It will be seen under Point 3 that such a holding is contrary to prior Ohio law. For present purposes, the significance of the holding is that it will prevent impecunious FELA litigants who retain an Ohio attorney from obtaining the fair determination of their cause by a jury which Congress endeavored to guarantee them. It requires

no citation of sociological studies to demonstrate that railroad employees are not ordinarily persons of independent means, that their savings are small, and that they are dependent on their earnings for food, clothing, and shelter. When they are killed or injured, this income stops. Unless they, or their widows, can be advanced money with which to obtain the bare necessities of life, they have no choice but to accept "a quick and cheap settlement" of the sort which was a prominent abuse in the early history of the Act. See *Brotherhood of Railroad Trainmen* v. *Virginia ex rel Virginia State Bar,* 377 U.S. 1, 3 (1964). The penniless cannot afford the luxury of the law's delays, and must take whatever pittance the railroad will offer.

The court below also held that petitioner was guilty of misconduct in employing, during his off hours, a railroad employee to investigate cases, some of which were against the railroad for which the employee worked. Such a holding, if it were permitted to stand, would prevent the effective investigation, and thus the effective prosecution, of FELA suits. Defendants already have a great advantage in the investigation of FELA claims. They have ready access to the witnesses and to the equipment and records involved in the accident, as well as a full understanding of the railroad operations which were being performed. Attorneys for plaintiffs must make their own investigation more circuitously. The only effective investigator for this purpose, as the record shows (Tr. 660-661), is a railroad employee. He understands the business, and he knows the other employees. He is able to obtain statements from witnesses who would be unwilling to give a statement to an outsider. There is not the slightest evidence that Orlando peered into confidential company records, or that he investigated for petitioner during the hours

he was being paid by the railroad, or that he trespassed upon company property. All that is shown is that he voluntarily obtained information for petitioner and gave information to petitioner during his off-hours. It was to permit such conduct that § 10 was added to the Act, 45 U.S.C. § 60, in 1939. The court below thought § 10 inapplicable, since it speaks of "voluntarily" furnishing information. Since Orlando was paid by petitioner, it considered that he was not furnishing the information "voluntarily." 176 Ohio St. at 268, 199 N.E.2d at 400. This argument will not survive the most cursory consideration of the meaning of the word "voluntarily." Certainly there is a distinction between a draftee and a volunteer for the armed forces, though both are paid. Orlando furnished information to petitioner of his own free will, and the statute prohibits any "device"—including a disbarment proceeding—intended to deter him from doing so. Section 10 of the Act was adopted "to protect employees. The intention of the Congress was to see to it that an injured employee could readily obtain all the available information from witnesses, particularly employees of the railroad company." *Dugger v. Baltimore & O. R. Co.*, 5 F.R.D. 334, 336 (E.D.N.Y. 1946). A holding that attorneys for FELA plaintiffs cannot employ railroad men as investigators thwarts that purpose.

Here what Ohio has sought to halt is not a commercialization of the legal profession which might threaten the moral and ethical fabric of the administration of justice. This is not an "ambulance chasing" case. Six of the seven charges of solicitation were dismissed by the panel because they were not supported by the evidence, and the Supreme Court of Ohio, being in disagreement as to the facts, did not pass on the seventh. What Ohio has here sought to halt is the fair

and effective prosecution of FELA claims. As is not uncommon in such cases, "this proceeding was more than an impartial investigation of unethical practices by a bar association with the sole desire to protect the public and the profession. The record indicates that it was an adversary proceeding between the railroads and one of their antagonists." *In re Heirich,* 10 Ill.2d 357, 380, 140 N.E.2d 825, 836 (1956). This proceeding came out of an investigation by the Association of American Railroads (Tr. 771-782), representatives of that Association were outside the courtroom throughout the hearing (Tr. 580), and testimony was offered that one of these representatives told a person he was interviewing "that they were trying to get rid of John Ruffalo and any attorney that had cases against the railroad." (Tr. 611.) The evidence last mentioned was excluded by the panel on the ground that "the American Association of Railroads, Mr. Lynch, and Mr. White are not on trial in this case, and we are not passing on their course of conduct in any way, shape or form." (Tr. 586-587.) Whether that ruling was right, or whether the court below was right in ignoring petitioner's objection that nine of the seventeen members of the Board of Commissioners were members of lawfirms which represent railroads, is not here in issue. But the zeal with which the railroads instigated and investigated this proceeding evidences the importance of the questions here presented to the impartial administration of the Federal Employers' Liability Act. When Congress prohibited, in § 5 of the Act, 45 U.S.C. § 55, any device whatsoever the purpose or intent of which shall be to enable any common carrier to exempt itself from liability under the Act, it wanted that section "to have the full effect that its comprehensive phraseology implies." *Duncan* v. *Thompson,* 315 U.S.

1, 6 (1942); *Boyd* v. *Grand Trunk Western R. Co.*, 338 U.S. 263, 266 (1949). Railroad-sponsored disciplinary action against plaintiffs' attorneys who advance money to clients, so that they need not accept an unjust settlement, and who hire railroad employees so that the facts may be effectively investigated, are a device with far greater potential to defeat liability under the Act than the practices found improper in the cases just cited.

2. *The court below decided a federal constitutional question of importance in a manner probably not in accord with decisions of this Court.* The states have a large measure of freedom in regulating the conduct of lawyers, but "a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights." *National Association for the Advancement of Colored People* v. *Button*, 371 U.S. 415, 439 (1963). "A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law." *Schware* v. *Board of Bar Examiners of the State of New Mexico*, 353 U.S. 232, 239 (1957). For purposes of this rule, there is no constitutional distinction between denial of admission to the bar and disbarment. *Cohen* v. *Hurley*, 366 U.S. 117, 123 (1961).

The grounds on which petitioner is indefinitely suspended from the practice of his profession are arbitrary grounds, bearing no rational connection to his fitness or capacity to practice law. A person is not unfit to practice law because he occasionally advances funds to needy clients. Indeed Resolution 24 of George Hoffman's *Fifty Resolutions in Regard to Personal*

Deportment, written more than a century and a quarter ago and extremely influential in the development of canons of ethics in this country, provides: "Should his wants be pressing, it will be an act of humanity to relieve them myself, if I am able, and if I am not, then to induce others to do so." [Reprinted in Drinker, Legal Ethics 338, 343 (1953).] This practice was held by the court below to violate Canon 10 of the Canons of Professional Ethics of the American Bar Association, which have been adopted by rule in Ohio. Canon 10, which prohibits the lawyer from purchasing an interest in his client's claim, is a vestigial remnant of the medieval law against champtery and maintenance. This law, according to a leading historian, is a product of the last flaring up of feudalism, and of the clerical opposition to litigation in the secular courts. Rádin, *Maintenance by Champtery*, 24 Calif.L.Rev. 48, 65-66 (1935). The conditions which gave rise to that law no longer exist. The Ohio Supreme Court, in an opinion overruled by the decision below, has recognized that "the conditions making the ancient rules necessary have substantially disappeared, and new conditions arisen by reason of which it has become the interest of the powerful to embarrass and hinder the dependent and weak from obtaining speedy justice in the courts." *Reece* v. *Kyle*, 49 Ohio St. 475, 487, 31 N.E. 747, 751 (1892). Advancing money to clients so that poverty will not bar them from asserting their claim has a purpose similar to that of contingent fee contracts, also denounced in ancient times but now accepted almost everywhere in this country.

The courts have recognized this, and the law with regard to advances to clients for living expenses is clearly developed. It is improper to solicit cases by promises to advance funds. *Fail* v. *Gulf States Steel*

Co., 205 Ala. 148, 87 So. 612 (1920); *State ex rel The Florida Bar v. Dawson*, 111 So.2d 427, 430 (Fla. 1959); *State ex rel Beck* v. *Lush*, 170 Neb. 376, 381, 103 N.W. 2d 136, 139 (1960); *Atchison, T. & S. F. Ry. Co.* v. *Jackson*, 235 F.2d 390, 393 (10th Cir. 1956); *El Janny* v. *Cleveland Tankers, Inc.*, 209 F. Supp. 91, 93 (N.D. Ind. 1962). There, of course, the vice is the solicitation, and the advances are merely the means of solicitation. It has been held also that advances are improper if the client is under no obligation to pay them back if there is no recovery. *State ex rel Nebraska Bar Ass'n* v. *Rein*, 141 Neb. 758, 4 N.W.2d 829 (1942); see *Johnson* v. *Great Northern Ry. Co.*, 128 Minn. 365, 370, 151 N.W. 125, 127 (1915) (dictum); Canon 42, Canons of Professional Ethics of the American Bar Association. *But cf. Reece* v. *Kyle*, 49 Ohio St. 475, 488, 31 N.E. 747, 751 (1892). Beyond this it has been uniformly held that it is neither unethical nor against public policy to make loans for living expenses. The fullest discussions of the point are in *Johnson* v. *Great Northern Ry. Co.*, 128 Minn. 365, 369-370, 151 N.W. 125, 127 (1915), and in *People ex rel Chicago Bar Ass'n* v. *McCallum*, 341 Ill. 578, 589-590, 173 N.E. 827, 831 (1930), but there is much other authority to the same effect: *Hildebrand* v. *State Bar of California*, 18 Cal. 2d 816, 824, 117 P.2d 860, 863-864 (1941); *In re Moore*, 8 Ill.2d 373, 381-382, 134 N.E.2d 324, 328 (1956); *Ryan* v. *Pennsylvania R. Co.*, 268 Ill.App. 364, 375-376 (1932); *In re Sizer*, 306 Mo. 356, 375, 267 S.W. 922, 928 (1924); *Mytton* v. *Missouri Pac. R. Co.*, 211 S.W. 111, 113 (Mo.App. 1919); *Bank of Chenango* v. *Hyde*, 4 Cow. 567 (N.Y. 1825); *cf. Grievance Committee of Fairfield County Bar* v. *Nevas*, 139 Conn. 660, 666-667, 96 A.2d 802, 805 (1963); *In re Randolph*, 347 S.W.2d 91, 92 (Mo. 1961); see *State ex rel The Florida Bar* v.

Dawson, 111 So.2d 427, 430 (Fla. 1959) (dictum); Note, 16 Ohio St.L.J. 114, 116 (1955). These precedents cannot be avoided by saying, as the court below does, that though the advances are in form a loan, in fact there is no reasonable source of repayment other than the proceeds of the claim. The record in the present case shows that Mrs. Beighley collected insurance more than sufficient to repay the advances made to her (Tr. 206), and that when Mrs. Clark asked for advances she was waiting for payments under railroad retirement (Tr. 134-135). Indeed there is evidence in the record that one Elijah Doster was advanced $300 by petitioner—although respondent made no claim that that advance was improper (Tr. 99)—and that he repaid part of the advance before his claim was settled (Tr. 98). It is simply not true to say that the attorney who makes such advances has no source of repayment other than the proceeds of the claim.

To suspend petitioner from the practice of law for making advances to impecunious clients, a practice which until now has been approved by every court which has passed upon it, is an arbitrary and irrational denial of his right to practice law. It is also an interference with the constitutional rights of clients. Even the Virginia Supreme Court of Appeals, which has had to be educated as to other constitutional limitations on its power to regulate professional conduct, held that Chapter 36, § 1(a), of the Virginia Acts of Assembly, 1956 Extra Session, prohibiting persons not having a direct interest in the proceedings from giving anything as an inducement to prosecute an action, was a denial of due process of law to indigent persons who would be barred by such a prohibition from free access to the courts. *National Association for the Advancement*

of Colored People v. *Harrison*, 202 Va. 142, 162-163, 116 S.E.2d 55, 71 (1960).

It is equally arbitrary and irrational to suspend petitioner from his profession because he employed a railroad employee as an investigator. It is improper for an employee to permit outsiders to trespass on the company property to take photographs, *Brotherhood of Railway and Steamship Clerks, etc.* v. *Atlantic Coast Line R. Co.*, 253 F.2d 753 (4th Cir. 1958), or to pay employees for confidential information which the lawyer used for solicitation of cases, *In re Newell*, 174 App.Div. 94, 160 N.Y.Supp. 275 (1916); *In re Noell*, 234 Mo.App. 1162, 96 S.W.2d 213 (1936). Those cases are not this, and there is no case condemning employment of the sort shown by this record. There is no canon prohibiting it. The Board of Commissioners though it violated Canons 29 and 32 of the Canons of Professional Ethics of the American Bar Association, without indicating which of the platitudinous generalities of those two canons it deemed in point. The Supreme Court of Ohio simply said it was wrong, without pointing to any canon or rule of court claimed to have been violated.

This Court has referred to "the undeniably correct premise that a State may not arbitrarily refuse a person permission to practice law * * *." *Cohen* v. *Hurley*, 366 U.S. 117, 122-123 (1961). The decision below is contrary to that premise.

3. *The decision below raises an important question as to the right of lawyers to fair warning of the permissible bounds of conduct.* It is settled here that state penal statutes must give fair notice of what it is that the state commands or forbids. *Connally* v. *General Construction Co.*, 269 U.S. 385 (1926); *Lanzetta* v.

New Jersey, 306 U.S. 451 (1939); *Musser v. Utah*, 333 U.S. 95 (1948). This requirement is violated by a statute too vague on its face, and it is violated also when a statute, seemingly narrow and precise, is unforeseeably and retroactively expanded by judicial construction. *Bouie* v. *City of Columbia*, 378 U.S. — (1964). For almost a century it has been established that disbarring a lawyer from the practice of his profession is punishment, and that laws having this effect must meet the tests applicable to a penal statute. *Ex parte Garland*, 4 Wall. 333 (1867). This is typically not true, however, of the canons and rules which govern discipline of the bar. "The literal rules or canons are not much help except for obvious cases. There are few judicial decisions. * * * [T]here are few formally expressed and approved guidelines." Schwartz, *Some Thoughts and Questions on Education for Professional Responsibility*, 35 L. A. Bar Bull. 183 (1960). See also Sutton, *Guidelines to Professional Responsibility*, 39 Tex. L.Rev. 391 (1961). Beyond the obvious cases of embezzling a client's funds, blatant solicitation, and conviction for a felony, courts and other disciplinary bodies are in general left free to sit like a kadi under a tree dispensing justice according to individual predilection. The present case is a striking example.

Ohio suffers from no lack of stated standards as to conduct. Rule XXVII(5) of the Ohio Supreme Court Rules defines "misconduct." Rule XXVIII of those rules is entitled "Rules of Professional Conduct." In its first section it adopts by reference the 47 Canons of Professional Ethics and the 36 Canons of Judicial Ethics of the American Bar Association. Seven succeeding sections state seven additional rules to which the lawyer must adhere. Despite this abundance of rules and canons, there was nothing from which peti-

tioner could have fairly expected that the activities for which he has been ordered suspended would be held to constitute professional misconduct.

With regard to the advances to clients condemned in charge 8, until the decision in this case was handed down by the court below on May 20, 1964, an Ohio lawyer could only have thought that such conduct was entirely proper. The decisions in other jurisdictions were uniformly to that effect, as shown under Point 2. The Ohio decisions looked in the same direction. In the leading case of *Reece* v. *Kyle*, 49 Ohio St. 475, 31 N.E. 747 (1892), the Ohio Supreme Court unanimously upheld an assignment to the lawyer by the client of his claim, with the proviso that if the attorney recovered on it, one-half of the proceeds would be paid to the client, and with the further agreement that the attorney would bear the costs and expenses in the first instance and that the client would reimburse him for 50% of such costs and expenses. Such an arrangement smacks far more of purchasing an interest in the claim than does an advance to the client, with the client under an absolute obligation to repay regardless of the result. Yet the Ohio court, in a lengthy discussion, held the arrangement neither illegal nor improper, and spoke forcefully of a professional "duty" to aid the indigent who have been injured, "for in this way many poor people are enabled to obtain justice, where, without such aid they would be remediless." 49 Ohio St. at 486, 31 N.E. at 750. Other Ohio cases built on the same principle, including *Scheinesohn* v. *Lemonek*, 84 Ohio St. 424, 95 N.E. 913 (1911), *Roberts* v. *Montgomery*, 115 Ohio St. 502, 154 N.E. 740 (1926), and *Cleveland Ry. Co.* v. *Godfrey*, 28 Ohio Law Rptr. 466 (Ohio App. 1928). In reaching a contrary result in the present case, the court below noted that these cases were all decided

before the court, in 1952, adopted by rule the Canons of Professional Ethics, and said: "In view of the adoption of those canons, those cases would no longer be applicable to the extent that they are inconsistent with provisions of the canons." 176 Ohio St. at 265, 199 N.E.2d at 398-399. Nothing in the canons gives fair notice that they are changing a well-settled body of Ohio law, or a doctrine fully developed in the cases elsewhere. It is true that Opinion 288 of the Committee on Professional Ethics and Grievances of the American Bar Association, delivered in 1954, and published 41 A.B.A.J. 30 (1955), condemns advances, though under circumstances more aggravated than those present in this case. But it is surprising doctrine that the opinion of a committee of a voluntary bar association, issued after the canons of ethics had been adopted in Ohio, controls over the decisions of the courts of Ohio and of other states. An Ohio commentator, writing subsequent to Opinion 288, did not recognize that such a change had occurred. He wrote: "It should be made clear, however, that the mere loaning of money to a client is not objectionable, per se. * * * The loan is objectionable when used as a means of securing a client." Note, 16 Ohio St. L.J. 114, 116 (1955). The panel which heard the charges against petitioner, men obviously experienced in disciplinary matters, were unfamiliar with Opinion 288, and said that the question of advances to clients "has never come up before, before us" (Tr. 787-788). The holding below that these advances constitute professional misconduct was an unforeseeable and retroactive expansion of the Ohio rules of professional conduct.

The situation is even worse with regard to charge 13, for here there is not even a committee opinion which arguably gave notice, not even a canon which colorably

can be cited as prohibiting the conduct there involved. The court points to no canon or rule to support its holding that "in our opinion" such conduct is wrongful. This is government by the length of the chancellor's foot, rather than government by law.

This is not to say that the canons of ethics can be made as precise as the multiplication tables, nor that there is no room for judicial interpretation of them. The sounder course, the only constitutionally permissible course, is that followed by the Illinois Supreme Court in the case of *In re Brotherhood of Railroad Trainmen,* 13 Ill.2d 391, 398, 150 N.E.2d 163, 168 (1958). The court there held that the regional counsel plan of the brotherhood was improper. An earlier decision by an intermediate appellate court had approved the plan. The Supreme Court said that because of that earlier decision, "proceedings looking toward the imposition of discipline should not be pursued." Insofar as the holdings below are otherwise proper, the court could have announced its understanding as a guide to attorneys in the future. To apply to this petitioner standards of conduct which could not fairly have been anticipated, and to punish him for violating these standards, "is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness." *Pierce* v. *United States,* 314 U.S. 306, 311 (1941). This Court should make it clear that attorneys, like all others, are protected by the Fourteenth Amendment against punishment except for conduct which the state has made clear is forbidden.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

CHARLES ALAN WRIGHT
71 Larch Road
Cambridge 38, Massachusetts

Attorney for Petitioner

September 10, 1964

APPENDIX A

OPINIONS AND JUDGMENT BELOW

FINDINGS OF FACT, CONCLUSIONS AND RECOMMENDATION OF BOARD OF COMMISSIONERS*

CHARGE NO. 8

It is charged that the Respondent advanced monies to Clara E. Beighley, Naomi Clark, and Sam Cotellesse while handling their claims, and deducted such advances from settlements of their claims. The uncontradicted evidence establishes that Respondent did advance a total of $1,025.00 to Clara Beighley during the period of time that he represented her, and that he advanced $611.00 to Naomi Clark during the time that he represented her. Respondent's representation of each of these parties extended over a period of several years. Respondent admits that these funds were advanced, but justifies the advances on the ground that they were made as an act of kindness at a time when these clients were in difficult circumstances. No evidence was offered to prove any advances to Sam Cotellesse.

The Legal Ethics Committee of the American Bar Association rendered an opinion, Number 288, on October 11, 1954, to the effect that payments, pending trial in personal injury cases, by an attorney to or for

*The full report of the board is a part of the Certified Transcript of Record, on file with this Court. Only those portions of the report dealing with charges 8 and 13, the two charges sustained by the Supreme Court of Ohio, are here reprinted.

the benefit of his injured client, for any purpose other than to cover expenses of litigation subject to reimbursement, are improper. In reaching this conclusion the committee considered Canon 42 which provides:

> "A lawyer may not properly agree with a client that the lawyer shall pay or bear the expense of litigation; he may in good faith advance expenses as a matter of convenience, but subject to reimbursement."

The Committee also considered Canon 10 which provides:

> "The lawyer should not purchase any interest in the subject matter of the litigation which he is conducting."

Canon 42 refers to expenses which are connected with the litigation such as court costs, depositions and similar expenses. It was the committee's opinion that a lawyer who makes advances to his client for other purposes thereby acquires an interest in the subject matter of the litigation which he is conducting in violation of Canon 10. The committee also observed that the practice, if publicized, constitutes a holding out by the lawyer of an improper inducement to clients to employ him in addition to the assurance of performing legal services for the client. In other words, such practice can constitute an indirect form of solicitation. The committee observed that the conclusion which it reached is contrary to the conclusion reached by the Supreme Court of Illinois in the case of *State E. R. Chicago Bar Association* v. *McCallum,* 341 Ill. 578, 173 N.E. 827. Three of the judges of the Supreme Court of Illinois dissented from the conclusion of the majority. The question was considered by Judge Beamer of the United States District Court for the North-

ern District of Indiana, Hammond Division, on September 26, 1962, in the case of *El Janny* v. *Cleveland Tankers, Inc.*, 209 F. Supp. 91. Judge Beamer held that a lawyer was not entitled to an order reimbursing him for monies advanced to his client and stated in the opinion:

> "The propriety of the practice of loaning or advancing money to clients in personal injury cases has long been questioned by the courts and the organized bar."

He cited and quoted from Opinion 288 of the Committee of the American Bar Association.

While it may be questioned whether or not an occasional advance or loan by a lawyer to a client constitutes a violation of Canon 10 or Canon 27, it is clear that where such advances are frequently made to various clients over an extended period of time, such practice does establish the violation of Canon 10 in that the lawyer acquires an interest in the subject matter of the litigation which he is conducting, beyond the payment of his fee. Moreover the practice constitutes an indirect form of solicitation in providing an inducement to seek out such lawyers for employment for reasons unrelated to their professional competence. The facts in the present case establish that the Respondent advanced money to Clara Beighley, Naomi Clark and Andrew Masters in various amounts, which according to Respondent's own testimony totaled $2,936.00. It further appears that the practice of Respondent in making such advances was known. One of the witnesses, Elijah Doster, testified that when he contacted Naomi Clark about employing Respondent, Doster told her that the Respondent would lend her money if she needed any. Naomi Clark confirmed this testi-

mony. Andrew Masters testified that the subject of advancing money was discussed with Respondent on the first occasion that Masters visited him.

CONCLUSION

It is, therefore, the conclusion of the Board that the Respondent is guilty of unprofessional conduct in violation of Canon 10 and Canon 27.

CHARGE NO. 13

It is charged that the Respondent conspired with Michael Orlando and paid Orlando money for preparing lawsuits against the Baltimore & Ohio Railroad which was Orlando's employer.

The evidence in support of this charge is not in dispute. Orlando worked as an investigator for the Respondent from 1953 to July 19, 1962. During this same period he was also an employee of the Baltimore & Ohio Railroad. He was suspended by the railroad on July 21, 1962 on charges of soliciting claims. A hearing was held on these charges but Orlando did not appear because he says he was in the New Castle Hospital. During his employment with the Respondent, Orlando was paid $25 a day plus expenses and investigated all of the Respondent's railroad cases. He said that he worked an average of ten or fifteen days a month for the Respondent. Withholding slips, Internal Revenue Form 1099, were received in evidence as Relator's Exhibits 7-A, 7-B, 7-C, 7 D and 7-E and showed the following amounts paid to Orlando by the Respondent:

1957	—	$2,950.00
1958	—	1,250.00
1959	—	1,237.37

1960 — 3,829.25
1961 — 4,716.00

According to Orlando, Respondent paid him in cash for which Orlando said he signed receipts. Orlando said that the Respondent kept no records, but paid Orlando on the basis of Orlando's records, but didn't keep these records after his Income Tax returns were filed (R. 641, 654, 655). Respondent stated:

> "We worked on that basis for the particular reason that we didn't want this man to be accused of exactly what he was accused of, which he wasn't doing and which he did not do, but the fact was that I was trying to protect him. He was trying to help me as an investigator. He had certain knowledge, certain abilities that I needed, and I was trying to protect him, and that was the reason that we worked this thing out this way. With any other person that has ever done any work for me, like Mr. Guthrie in my office, or anyone else, I have paid him by check, but particularly for security reasons for this man, that was the reason we worked it this way."

Later Respondent testified that he had no record of payments made to Orlando on his books. He also testified that—

> "* * * as soon as they were examined by the Internal Revenue Department, why, we got rid of them, because we didn't want to keep them, because of the fact we didn't want to involve Mike —" (R. 44).

The Respondent was ordered by a subpoena issued by the Board (Relator's Ex. 8) to produce "all your records, checks, disbursements and receipts of any kind or nature showing payments to Michael Orlando of Newcastle, Pa. for the years 1957, 1958, 1959, 1960,

1961 and 1962." Respondent only produced the withholding slips, Form 1099 (Relator's Exhibits 7-A, 7-B, 7-C, 7-D and 7-E above). Respondent was also requested by the Chairman of the Panel to produce all of his records so that counsel for the Relator could determine for themselves whether or not his records contained any entries which would reflect on the payments made by Respondent to Orlando (R. 427, 428, 429). The Respondent did not produce his records and refused to comply with the request of the Chairman of the Panel (R. 596, et seq.).

Although the full extent of Orlando's activities in behalf of the Respondent could perhaps be better determined if Respondent had submitted his records for examination as requested by the Chairman of the Panel, there is no dispute about the fact that the Respondent did employ Orlando to investigate cases against the Baltimore & Ohio Railroad while Orlando was working for that railroad. (R. 672, 673.) Furthermore, the Respondent admits that he kept no entries of payments to Orlando so that he would have no record which would disclose the fact that Orlando was employed by the Respondent. The panel questioned the Respondent at length (R. 656, et seq.) on his views relating to the practice of employing Orlando to investigate cases against the Baltimore & Ohio, while he was employed by that company. He saw nothing wrong with the practice because he was "doing something altogether different from the type of work he was doing on the railroad" (R. 658). But he admitted employing Orlando because of the advantages in having a railroad man working for him (R. 660). He saw no distinction between employing any railroad employee and one who was investigating claims against his own employer, because "our concepts have changed * * *."

CONCLUSION

The Board does not agree that "our concepts have changed" with respect to the fundamental principle that an agent cannot serve two masters. In 1881 the Supreme Court decided the case of *Bell* v. *McConnell*, 37 O. S. 396. In the Opinion in that case, it is stated (399):

> "In law, as in morals, it may be stated, as a principle, no servant can serve two masters, for either he will hate the one and love the other, or else he will hold to the one and despise the other. Luke 16, 13."

The Board concludes that the statement of this moral and legal principle is as valid today as it was 82 years ago when Bell v. McConnell was decided. See also *2 O. Jur. (2d) 178, Sec. 118,* and *35 O. Jur. (2d) 699, Sec. 78.*

The Board cannot agree with the Respondent's contention that the principle condemning double-agency does not apply because of the difference between Orlando's duties as a railroader from those as an investigator. The fidelity which the employee owes his employer is the same regardless of any distinction which may be made between the nature of the duties he is performing for his employer and those which others may employ him to perform against his employer.

On page 43 of their brief, counsel for Respondent cite Title 45 U.S.C., Sec. 60 which makes it unlawful to attempt to prevent an employee of a common carrier from voluntarily furnishing information to "a person in interest" as to facts incident to the injury or death of any employee. It is contended by counsel that the provisions of this section of the United States Code make the arrangement between Orlando and Respondent a valid and proper one; that if the Board should

hold that the activities of Orlando constitute a basis for discipline of Respondent, such holding would constitute an interference by the State of Ohio with the policy of the Federal law governing the rights of railroad employees under the Act. It is the conclusion of the Board that there is a clear distinction between the action of an employee in "furnishing voluntary information to a person in interest" and those of an employee employed by a lawyer to investigate cases against his employer. There is no provision of the section of the Code which in any way relates to the arrangement which existed between Orlando and the Respondent.

CONCLUSION

It is the conclusion of the Board that the evidence establishes that Respondent was guilty of misconduct in being a party to a transaction which caused Orlando to breach his duty to his employer, and that by reason of such practice the Respondent was guilty of misconduct as stated in the charge and violated Canon 29 and Canon 32 of the Canons of Professional Ethics.

* * *

RECOMMENDATION

It is the recommendation of the Board of Commissioners on Grievances and Discipline that the Respondent be disbarred.

OPINION OF THE SUPREME COURT OF OHIO

MAHONING COUNTY BAR ASSOCIATION *v.* RUFFALO.

Attorneys at law—Misconduct—Disciplinary action—Suspension—Acts warranting.

(D. D. No. 57—Decided May 20, 1964.)

ON CERTIFIED REPORT by the Board of Commissioners on Grievances and Discipline.

The facts are stated in the opinion.

Mr. David C. Haynes and *Mr. Comus M. Beard*, for relator.

Mr. John J. Chester and *Mr. C. Richard Grieser*, for respondent.

Per Curiam. This proceeding was set in motion in 1962 when the Mahoning County Bar Association filed its written complaint with the Board of Commissioners on Grievances and Discipline, charging John Ruffalo, Jr., an attorney at law of the city of Youngstown admitted to the Bar of Ohio in 1946, with unprofessional and unethical conduct in violation of the Canons of Professional Ethics.

The complaint, consisting of 14 charges, was referred to a three-member hearing panel for the taking of evidence and for report. Upon hearing, the panel concluded that charges numbered 3, 8, 9, 10, 11, 12 and 13 had been proved, and that respondent had violated Canons 10, 27, 29 and 32 of the Canons of Professional Ethics. Based on the findings and conclusions of the

panel and the record, the board recommended that respondent be disbarred.

As stated in paragraph five of the syllabus in *In re Lieberman* (1955), 163 Ohio St., 35, 125 N.E. (2d), 328, "the degree of proof required in a disbarment proceeding is a preponderance of the evidence." To the same effect see the *per curiam* opinion in *Cleveland Bar Association* v. *Fleck* (1961), 172 Ohio St., 467, 469, 178 N.E. (2d), 782.

In cases of this kind, the board of commissioners acts for and on behalf of this court. In doing so, it makes recommendations as to the facts which should be found and the action which should be taken by this court. However, this court has full responsibility for determining what the facts are and what action should be taken on those facts.

As to charge No. 8, it is stated in respondent's brief:

> "The facts * * * which are alleged in this charge are that respondent 'did advance monies to certain clients * * * while their claims were pending, which advances were deducted from any settlements * * * later received the settlement of said claims.' Those facts do not * * * constitute misconduct * * *.
>
> "* * *
>
> "The record shows that respondent did advance monies to certain clients, but with the understanding that such monies were to be repaid irrespective of the outcome of the pending litigation. * * *
>
> "A loan is not a purchase. So long as there is an agreement that the money is a debt and is to be repaid irrespective of the outcome of the case, it is nonsense to claim that the loan or advance amounts to the *purchase* of an interest in the litigation. Indeed, a contingent fee contract with an assignment to the lawyer (the recovery of which

is wholly dependent upon the outcome) comes much closer to the prohibition in this canon [No. 10] than the simple loan or advancement of money. Yet such a fee contract is perfectly valid in the state of Ohio and has been upheld by the courts of Ohio in litigation involving lawyers' claims based upon such contracts. *Roberts* v. *Montgomery*, 115 Ohio St., 502, *Scheinesohn* v. *Lemonek*, 84 Ohio St., 424, and *Cleveland Ry. Co. v. Godfrey*, 28 O. L. R., 466 * * *." But cf. Canon 13.

Canon 10 provides:

> "The lawyer should not purchase any interest in the subject matter of the litigation which he is conducting."

Canon 42 reads:

> "A lawyer may not properly agree with a client that the lawyer shall pay or bear the expenses of litigation; he may in good faith advance expenses as a matter of convenience but subject to reimbursement."

It is clear that the word "expenses" appearing after the semicolon refers to "expenses of litigation." It would not include advances of the kind admittedly made by respondent for "living expenses * * * during the period between the filing of and the trial or disposal of the case." See opinion No. 288 of the Legal Ethics Committee of the American Bar Association, 41 A. B. A. Journal, 33, issue of January 1955. We cannot reconcile the majority opinion in *People, ex rel. Chicago Bar Association*, v. *McCallum* (1930), 341 Ill., 578, 173 N.E., 827, on this question with Canons 10 and 42.

It is obvious that, where the advancement of living expenses is made, as in the instant case, to enable a disabled client and his family to survive, any agreement

by the disabled client to repay them would not have the effect of providing the attorney with any reasonable source of repayment other than the proceeds received on trial or settlement of his client's claim. In effect, the attorney has purchased an interest in the subject matter of the litigation that he is conducting. The canons contemplate that this will be proper only where the advance is for "expenses of litigation."

It may be observed that the cases of *Roberts* v. *Montgomery, supra* (115 Ohio St., 502), *Scheinesohn* v. *Lemonek, supra* (84 Ohio St., 424), *Cleveland Ry. Co. v. Godfrey, supra* (28 O. L. R., 466), and *Reece* v. *Kyle* (1892), 49 Ohio St., 475, were all decided before this court adopted by the rule the Canons of Professional Ethics. In view of the adoption of those canons, those cases would no longer be applicable to the extent that they are inconsistent with provisions of the canons.

As to charge No. 13, the report of the board summarizes the evidence and facts as follows:

> "It is charged that the respondent conspired with * * * Orlando and paid Orlando money for preparing lawsuits against the Baltimore & Ohio Railroad which was Orlando's employer.
>
> "The evidence in support of this charge is not in dispute. Orlando worked as an investigator for the respondent from 1953 to July 19, 1962. During this same period he was also an employee of the Baltimore & Ohio Railroad. He was suspended by the railroad on July 21, 1962, on charges of soliciting claims. A hearing was held on these charges but Orlando did not appear because he says he was in the New Castle Hospital. During his employment with the respondent, Orlando was paid $25 a day plus expenses and investigated all of the respondent's railroad cases. He said that he worked an average of ten or fifteen days a month

for the respondent. Withholding slips, internal revenue form 1099, were received in evidence * * * and showed the following amounts paid to Orlando by the respondent:

"1957	—	$2,950.00
"1958	—	1,250.00
"1959	—	1,237.37
"1960	—	3,829.25
"1961	—	4,716.00

"According to Orlando, respondent paid him in cash for which Orlando said he signed receipts. Orlando said that the respondent kept no records, but paid Orlando on the basis of Orlando's records, but didn't keep these records after his income tax returns were filed * * *. Respondent stated:

"'We worked on that basis for the particular reason that we didn't want this man to be accused of exactly what he was accused of, which he wasn't doing and which he did not do, but the fact was that I was trying to protect him. He was trying to help me as an investigator. He had certain knowledge, certain abilities that I needed, and I was trying to protect him, and that was the reason that we worked this thing out this way. With any other person that has ever done any work for me * * * I have paid him by check, but particularly for security reasons for this man, that was the reason we worked it this way.'

"Later respondent testified that he had no record of payments made to Orlando on his books. He also testified that—

"'* * * as soon as they were examined by the Internal Revenue Department, why, we got rid of them, because we didn't want to keep them, because of the fact we didn't want to involve Mike—' * * *.

"The respondent was ordered by a subpoena issued by the board * * * to produce 'all your records, checks, disbursements and receipts of any kind or nature showing payments to Michael Orlando * * * for the years 1957, 1958, 1959, 1960, 1961, and 1962.' Respondent only produced the withholding slips * * *. Respondent was also requested by the chairman of the panel to produce all of his records so that counsel for the relator could determine for themselves whether or not his records contained any entries which would reflect on the payments made by respondent to Orlando * * *. The respondent did not produce his records and refused to comply with the request of the chairman of the panel * * *.

"Although the full extent of Orlando's activities in behalf of the respondent could perhaps be better determined if respondent had submitted his records for examination as requested by the chairman of the panel, there is no dispute about the fact that the respondent did employ Orlando to investigate cases against the Baltimore & Ohio Railroad while Orlando was working for that railroad * * *. Furthermore, the respondent admits that he kept no entries of payments to Orlando so that he would have no record which would disclose the fact that Orlando was employed by the respondent. The panel questioned the respondents at length * * * on his views relating to the practice of employing Orlando to investigate cases against the Baltimore & Ohio, while he was employed by the company. He saw nothing wrong with the practice because he was 'doing something altogether different from the type of work he was doing on the railroad' * * *. But he admitted employing Orlando because of the advantages in having a railroad man working for him * * *. He saw no distinction between employing any railroad employee and one who was investigating claims against his own employer, because 'our concepts have changed * * *.'"

With respect to this summarization, respondent's brief in this court states:

> "As stated by the board, there is no dispute in the evidence with respect to the foregoing charge. The board does indulge in some innuendos, but the facts relevant to this charge are, simply stated, these: Respondent did hire Michael Orlando to investigate lawsuits for him, and some of those lawsuits involved claims against the Baltimore & Ohio Railroad Company. During this time * * * Orlando was an employee of the Baltimore & Ohio Railroad Company, but engaged in train service, that is, the service of a working railroad brakeman. While we do not consider it material, respondent did frankly testify that he kept no entries of payments to Orlando and that payments were made in cash."

Respondent contends that his employment of Orlando to work against the interests of Orlando's employer, B. & O., was proper by reason of the provisions of Section 60, Title 45, U. S. Code, which reads in part:

> "Any contract, rule, regulation, or device whatsoever * * * to prevent employees of any common carrier from furnishing *voluntarily* information * * * as to the facts incident to the injury or death of any employee, shall be void, and whoever * * * shall attempt to prevent any person from furnishing *voluntarily* such information to a person in interest, or whoever discharges or otherwise disciplines or attempts to discipline any employee for furnishing *voluntarily* such information to a person in interest, shall, upon conviction * * * be punished * * *." (Emphasis added.)

Obviously this statute would have no application to the instant case. Orlando did not "voluntarily" furnish information. He was paid by defendant to get information.

Respondent's employment of Orlando to work against the interests of his employer, B. & O., so as to benefit respondent and his clients was not an isolated instance. What records respondent was able to produce indicated substantial payments to Orlando in each of five years.

The payment of $4,716 in 1961 was all for work done prior to July 19 of that year.

Respondent now argues that there was nothing wrong with respondent's paying Orlando substantial sums of money to work against the interests of his employer, B. & O., so as to benefit respondent and his clients.

If the respondent did not know that it was wrong to do this, why did he try to cover it up? His testimony that he did this to protect Orlando from charges being made by B. & O. is not convincing testimony that he did not know that this employment of Orlando was wrong.

Why did respondent not produce records to show what the payments were for? The evasive attempts of both Ruffalo and Orlando to explain their lack of records on the basis that they were no longer needed to sustain their income tax returns arouses a strong suspicion that those records contained information which would have been damaging to both Ruffalo and Orlando. Their 1961 income tax returns could not have been filed before January 1962 and were not due until April 1962. In July 1962, B. & O. charged Orlando with soliciting cases against it for Ruffalo. In September 1963, Ruffalo was charged with employing Orlando to solicit cases for him. Ruffalo undoubtedly knew that such charges were being prepared and investigated long

before that time. It is difficult to believe that the 1961 federal income tax returns of either Orlando or Ruffalo had been checked by the Internal Revenue Service before July or even September 1962. At that time, they definitely knew that any records showing either of them to be innocent of charges of soliciting would be helpful to both. It is almost impossible to reach any reasonable conclusion that the records of either, at least for 1961, were not destroyed in order to prevent their use against Orlando in the proceedings brought against him by B. & O. and against Ruffalo in the proceedings brought against him.

In our opinion, one who believes that it is proper to employ and pay another to work against the interests of his regular employer is not qualified to be a member of the Ohio bar. He is even less qualified if he does so, when he knows, as the evidence clearly indicates Ruffalo did know, that it is improper to do so.

This is not the first time that respondent's conduct as a member of the bar has been questioned and found improper. After he was found "guilty of unprofessional conduct in his office as an attorney at law * * * in that he did by and through duly authorized agents and employees solicit professional employment from sundry people" and was disciplined therefor in 1957, he showed a contempt for the court, which made that finding and provided a very lenient discipline for his misconduct. Although he admittedly was well able to pay the costs amounting to several hundreds of dollars and had been ordered by that court to "pay the costs of this proceeding within 30 days," he neglected to make any effort to pay them until shortly before the first hearings in these proceedings more than five years later.

The members of this court are not in agreement as to whether the facts are as the board of commissioners recommended they should be found with respect to some of the other charges against respondent. However, in view of the admitted facts with regard to charges 8 and 13 and the previous judgment of 1957 and the attitude of respondent with respect thereto, we are of the opinion that respondent should be suspended for an indefinite period from the practice of law.

Judgment accordingly.

TAFT, C. J., ZIMMERMAN, MATTHIAS, O'NEILL AND KERNS, JJ., concur.

GIBSON, J., concurs in the judgment.

HERBERT, J., dissents.

KERNS, J., of the Second Appellate District, sitting by designation in the place and stead of GRIFFITH, J.

GIBSON, J., concurring. In view of the respondent's right to apply for reinstatement after the passage of two years following the order of suspension, I concur in the judgment of the court. Paragraph 21, Rule XXVII of this court. Because of the nature of the issues decided in the instant case, I believe it desirable to comment briefly upon them.

Since it is evident that basically the court and the board of commissioners treat this as a case of solicitation, the following comments may not be inappropriate.

Although the solicitation of law business does not import venality, criminality, fraudulent practices or moral turpitude, it is inimical to the good reputation

of the bar. Solicitation within the meaning of Canon 27 can not be precisely defined in such a way as to apply in every case.

Courts surely are not expected to be ignorant of things that other men well know. Everyone knows that attorneys, for their practice, depend upon friends, clients and former clients, and their activities within the community. Friends, acquaintances, and associates of an attorney have the unquestioned right to praise his legal abilities and to divert to him such clients as they can persuade in a legitimate way to engage his services.

This respondent has pursued the personal injury practice of law successfully and aggressively. We would be naive to say that his enterprise has not occasionally carried him into areas where his activity is subject to criticism. In fact, the record clearly shows that in 1957 he was reprimanded by the Common Pleas Court for unprofessional conduct in soliciting professional employment by and through authorized agents and employees.

Charges No. 8 and No. 9 relate to instances where respondent advanced money to certain clients. Respondent admits that such advances were made but justifies them on the ground that they were made as acts of kindness at a time when these clients were in necessitous circumstances.

Clearly, the existence of an attorney-client relationship does not *ipso facto* make a loan from a lawyer to his client against public policy or contrary to the Canons of Professional Ethics. Canon 42 expressly recognizes that a lawyer may in good faith advance expenses of litigation as a matter of convenience but subject to reimbursement. Perhaps an occasional ad-

vance or loan by a lawyer to his client is not proscribed. At best it is a practice which should be followed infrequently and used with extreme caution because it has long been questioned by the courts and the organized bar. It may well be that the advances made by respondent were of such amounts and frequency, and without a sufficiently clear obligation on the part of the clients to reimburse respondent regardless of recovery, that the finding that respondent is guilty of unprofessional conduct in violation of Canon 10 and Canon 27 is proper.

In charge No. 13, the respondent is accused of conspiring with Michael Orlando and paying Orlando money for preparing lawsuits against the Baltimore & Ohio Railroad, which was Orlando's employer. The evidence shows that Orlando worked for the railroad from 11:00 p.m. to 7:00 a.m., five days a week, and that the daystime was his own without restriction. There is nothing unethical in the employment of an investigator. It can not be inferred from such employment that the attorney is "ambulance chasing." In fact the board did not find that Orlando had been soliciting claims for respondent. It found instead that respondent was guilty of misconduct because he was a party to a transaction which caused Orlando to breach his duty of loyalty to his employer.

The principle that "an agent can not serve two masters" is well established. Certainly an attorney may not ordinarily represent principals with conflicting interests, *e.g.*, vendor and vendee of property. But here the respondent was a principal or master and not the agent or servant. It would appear that the penalty, if any, for a transgression of the principal should be borne by the agent, Orlando. I fail to find any provi-

sion in Canon 29 or Canon 32 which would require that a sanction be applied against the respondent, who merely made it possible for Orlando to attempt to serve "possible" conflicting interests.

HERBERT, J., dissenting. I am unable to join in the judgment entered in this cause, basically, for two reasons: (1) the judgment in substance overrules long recognized and established principles of law in Ohio, to wit, *Roberts* v. *Montgomery,* 115 Ohio St., 502; *Scheinesohn* v. *Lemonek,* 84 Ohio St., 424; *Cleveland Ry. Co.* v. *Godfrey,* 28 O. L. R., 466; and *Reece* v. *Kyle,* 49 Ohio St., 475; and (2) a recent decision of the Supreme Court of the United States, being *Brotherhood of Railroad Trainmen* v. *Virginia, ex rel. Virginia State Bar* (April 20, 1964), , 84 S. Ct., 1113.

The *per curiam* overrules *Reece* v. *Kyle,* 49 Ohio St., 475. In that case, Spear, C. J., delivered a scholarly opinion of a unanimous court upon the obstacles that have confronted courts for hundreds of years in Anglo-Saxon judicial history. He pointed out the efforts to throttle the vicious practices of champerty and maintenance but also emphasized the ever-present duty of the courts to protect the weak and dependent from oppression by the powerful. While commenting upon rules necessary to control evils of the past, he warned, in the opinion, at page 487:

> "* * * new conditions arisen by reason of which it has become the interest of the powerful to embarrass and hinder the dependent and weak from obtaining speedy justice in the courts."

In the case at bar, respondent, over a period of years, and with a large clientele according to the relator, gave financial aid to three or four needy clients. The importance of financial aid from his lawyer to an injured

workman may spell the difference between injustice and justice.

For example, a member of a railroad train crew or yard crew is injured or killed by reason of the negligence of the railroad. The injured man or the dependents, through a fiduciary, contract with a lawyer to represent them in negotiations for settlement or in litigation.

The railroad offers a meager totally inadequate settlement—a small percentage of what a lawful judgment could reasonably be expected. In making this inadequate settlement offer, the claims department of the railroad advises that the railroad can delay final decision for years. In short, the powerful can close the doors of the courts to the weak by reason of the lack of finances of the claimant.

Under the pronouncement in the case at bar, lawyers in Ohio are not permitted to give or loan financial assistance to a client even though the injured employee or the dependents in case of death are in want and hungry.

People, ex rel. Chicago Bar Association, v. *McCallum,* 341 Ill., 578, 173 N.E., 827, is a case squarely in point.

There, the facts recited in the opinion are amazing. It is well worth reading. The second paragraph of the syllabus states the law of the case in this language:

> "*Advancing money to indigent client is not against public policy.* The practice of advancing money to the injured client with which to pay living expenses or hospital bills during the pendency of a personal injury case and while he is unable to earn anything, may, in a sense, tend to foment litigation by preventing *an unjust settlement from*

necessity, but there is no authority holding that it against public policy and no reason why it should be so considered, *as a man in indigent circumstances thereby may obtain justice where without such aid he would be unable to do so.*" (Emphasis added.)

Under the holding in the case at bar, the doctrine of the *McCallum case* cannot be followed in Ohio.

Charge 13 and the facts in support thereof are quite simple. One Orlando was a yard employee of the Baltimore & Ohio Railroad. He released the "air" of incoming trains. He had a regular tour of duty. He performed his duties faithfully and well. He was loyal to his employer in his employment. Respondent employed Orlando during some of his off-duty hours and on his own time to interview witnesses and discover the facts and circumstances surrounding episodes wherein clients of the respondent were injured while in the performance of their railroad duties or were killed by reason of the negligence of the employing railroad.

To establish negligence of a railroad causing such an injury or death, witnesses, who thoroughly understand the intricate and complex construction and operation of railroad mechanical devices and equipment, are essential. Such information and such witnesses are necessary to establish a case, for an injured workman or for the dependents of one killed, by testimony by those familiar with railroading and the operation of trains.

Orlando's employment was not in violation of law. It was thoroughly consistent with enactments of Congress, particularly Section 60, Title 45, U. S. Code, referred to in the *per curiam* opinion. This law intended to make available information to injured em-

ployees and persons in interest. Without the aid of Orlando or some other well-informed person, the respondent would not have the names of necessary witnesses and would be handicapped severely in the presentation of a case of an injured railroad workman or the dependents of one killed by reason of the railroad's negligence. By his extra work, Orlando helped the injured and the dependents of the dead to secure justice. The *per curiam* says that Orlando was disloyal to his railroad employer, and that respondent was unworthy of being a lawyer because he used witnesses and information secured by Orlando. The respondent was acting under a law enacted by the United States Congress above mentioned and in furtherance of the administration of justice.

Respondent furnished records to the Internal Revenue Service to show his payments to Orlando in order to deduct the same from his own income tax. It seems to me that records that satisfy the Internal Revenue Service were all that respondent was required to keep. It is said that Orlando was disloyal to his railroad employer by furnishing information and evidence that would compel his employer to respond to the requirements of justice. Orlando was acting in pursuance to and in accordance with a congressional enactment. He was at the same time giving an invaluable service to injured railroad workmen and the dependents of the dead who were represented by the respondent.

> "A state could not, by invoking the power to regulate the professional conduct of attorneys, *infringe in any way* the right of individuals and the public to be fairly represented in lawsuits authorized by Congress to effectuate a basic public interest." (Emphasis added.) *Brotherhood of Rail-*

road Trainmen v. *Virginia, ex rel. Virginia State Bar, supra.*

Charge number 13 against the respondent, and the facts offered to substantiate it, appear to me to be clearly contrary to the above-quoted principle of law.

JUDGMENT

This cause came on to be heard upon the Objections by respondent to the Final Report of the Board of Commissioners on Grievances and Discipline and was argued by counsel. On consideration whereof, it is ordered and adjudged by this Court that the Final Report of the Board of Commissioners on Grievances and Discipline be, and the same hereby is, modified to reduce the discipline recommended by the Board of Commissioners to an indefinite suspension.

It is further ordered and adjudged that the Final Report of the Board of Commissioners on Grievances and Discipline, as modified, be, and the same hereby is, confirmed and the respondent John Ruffalo, Jr., is indefinitely suspended from the practice of law.

The respondent, John Ruffalo, Jr., is hereby ordered to cease and desist from the practice of law in any form and is forbidden to appear on behalf of another before any court, judge, commission, board, administrative agency or other public authority. It is further ordered that he be forbidden to counsel or advise, or prepare legal instruments for others or in any manner perform services of any kind for others which would constitute the practice of law. He is also forbidden to hold himself out to another or to the public as being authorized to perform legal services, and he is hereby divested of each, any and all of the rights, privileges

and prerogatives customarily accorded to members in good standing of the legal profession of Ohio.

It is further ordered that the respondent, John Ruffalo, Jr., surrender his certificate of admission to practice to the Clerk of this Court forthwith and that his name be stricken from the roll of attorneys maintained by this Court.

It is further ordered that the respondent, John Ruffalo, Jr., pay the costs of these proceedings taxed in the amount of One Thousand Six Hundred and Eighty-eight dollars and Ninety-four cents ($1,688.94).

It is further ordered that copies of this Entry be certified to the Respondent, to all counsel of record, to the Board of Commissioners on Grievances and Discipline, to the Mahoning County Bar Association, to the Presiding Judge of the Federal District Court at Cleveland, Ohio and to the Presiding Judge of the Court of Common Pleas for Mahoning County.

Approved: Kingsley Taft, Chief Justice.

APPENDIX B

HOW THE FEDERAL QUESTIONS WERE RAISED

As set forth in the Statement of the Case, the federal claim with regard to charge 13 was expressly rejected by the Supreme Court of Ohio, and the details as to how it was raised need not be reproduced here. Rule XXVII(37) of the Supreme Court of Ohio calls for procedure to be "as summary as reasonably may be." It makes no provision for raising legal objections before the hearing panel or the Board of Commissioners, and permits amendments to any answer or objection "at any time prior to final order of the Court." By agreement of the parties and the hearing panel, legal objections were not stated to the panel, and it was agreed that all such objections might be raised in the brief (Tr. 1021-1022). Accordingly the briefs, although not ordinarily a part of a record in this Court for this purpose, may here be considered.

The following excerpt is taken from the discussion of charge 8, at pp. 24-25 of the brief for the present petitioner filed with the hearing panel and the board: "Indeed, the most compelling and ethical reason *for* the advancement of such moneys is to prevent or at least alleviate hardships from destruction of earning power due to injuries or death of the family breadwinner. This is especially true in cases arising under the Federal Employers' Liability Act where the injury or death usually strikes the family breadwinner and where compensation is dependent upon either a successful action in a court before a jury or a voluntary settlement with the employer, the railroad. Advancements so made *after* the attorney-client relationship

has been established *do not and cannot stir up litigation.* The right and the claim is established by law and has already been asserted and the attorney retained. On the contrary, such rights and claims established by law may well be minimized or thwarted altogether if such advancements are not made so that the client or family can survive until the time of trial. To punish a lawyer for making such advancements on some allegedly ethical grounds is the same as stating that under the Federal Employers' Liability Act the employee's right to trial in a court of law must be denied unless he has the means of obtaining the money to carry himself until the date of trial."

The same objection was renewed in identical terms at pp. 35-36 of the Objections to Report of the Board of Commissioners on Grievances and Discipline, filed with the Supreme Court of Ohio. The following excerpts are also taken from those Objections. At pages 1-2: "2. The proceedings herein are in violation of Article I, Section 1 and 16, of the Constitution of Ohio and of the Fourteenth Amendment of the United States Constitution in that the State of Ohio through the proceedings herein has abridged the privileges and immunities of Respondent, a citizen of the United States and of this State, and has deprived Respondent of the pursuit of his livelihood and happiness without due process or due course of law, and have denied to Respondent the equal protection of the law accorded to other citizens." At page 4: "19. The conclusions and the recommendation of the Board were unconstitutional, unlawful, arbitrary and unreasonable." At pages 11-13: "Assuming as this Court has held that it does have constitutional power and authority to pass rules and laws and to set up exclusive procedures with respect to the practice and discipline of attorneys, we

submit that both the Ohio Constitution and the Fourteenth Amendment to the United States Constitution require certain procedural and substantive safeguards and rules to be applied, whether the proceeding be called a hearing, a trial or whatever. Certainly equal protection under the law and due process and due course of law imply that one who is to be deprived of a valuable right by an adverse finding or decision (whether he be an attorney at law with his livelihood at stake or a corporation with mere loss of money at stake) is entitled to the fundamental rules and safeguards to which any other citizen is entitled under like circumstances. By that we mean that Respondent in any event cannot be constitutionally stripped of his license to practice law unless the proceedings, whether under this Court's rules or in a court at law, are *conducted and decided* under the rules of law and under fundamental rules of procedure. He is entitled certainly to be served with, advised of and tried after reasonable notice under written and concise charges and no others. * * * We submit, in short, that the Respondent cannot be constitutionally stripped of his license to practice law if entirely different procedural rules and substantive laws are applied to him than those applied to other citizens in defending much less serious claims or charges."

The following excerpts are from pages 1-3 of the Application for Rehearing filed with the Supreme Court of Ohio:

> "1. The holding that loans by respondent, an Ohio attorney, to clients with claims under the Federal Employers' Liability Act (Title 45, U.S.C., Sections 51. et seq.) made and accepted, according to this Court's finding, to enable such clients or their families to survive pending liti-

gation under that Act amount to the purchase of an interest within the meaning of Canon 10 of the Canons of Professional Ethics and are, therefore, unethical and forbidden is an unconstitutional infringement of the rights of such clients to be fully and fairly represented in lawsuits authorized by Congress under that Act to effectuate a basic public interest and is an unconstitutional infringement of respondent's representation of such clients as an attorney at law, and, is, moreover, an undue and retroactive impairment of and restraint of the rights to contract and to acquire, possess or protect property rights; and that holding is contrary to and in violation of the First, Fifth and Fourteenth Amendments of the United States Constitution, and of Article I, Sections 1, 2, and 16 and Article II, Section 28, of the Ohio Constitution.

"2. The holding that loans by respondent, an attorney, to clients with claims for personal injuries or wrongful death under the Federal Employers' Act (Title 45, U.S.C., Sections 51, et seq.), made and accepted, according to this Court's finding, to enable such clients or their families to survive pending litigation are unethical and forbidden upon the ground that the attorney has no 'reasonable source of repayment other than the proceeds received on trial or settlement of his client's claim' is an unconstitutional discrimination by the State of Ohio against all litigants with claims under that Federal Act who are without funds or means of security for loans and against the attorney representing such litigants, with the result that the rights of such indigent claimants and their families under lawsuits authorized by the Congress of United States have been and will be seriously and substantially infringed and impaired and the representation of such indigent clients by respondent as an attorney at law has been and will be likewise infringed and impaired; and said holding is in violation of the First, Fifth and

Fourteenth Amendments of the United States Constitution and of Article I, Sections 1, 2 and 16 of the Ohio Constitution.

"3. This Court's declared inherent power to regulate attorneys of Ohio cannot be constitutionally invoked to forbid such loans and to infringe constitutional rights as set forth in the first two paragraphs in support of this application, particularly where as in this proceeding: (a) the loans were made after the attorney-client relationship was established to effectuate a claim or claims authorized by Acts of Congress; (b) there was an agreement in each case to repay the loans irrespective of the outcome of the litigation; (c) such loans so made and so agreed to be repaid were not contrary to public policy of this state and indeed were in conformity with the previously declared *law* of this state, statutory and judicial; and (d) such loans were and are not contrary to the policy of the federal law authorizing the claims and indeed were and are necessary in order to obtain full vindication of the claimants' rights under that law in view of the state of the trial dockets in many courts causing delays beyond the control of either the claimants or their attorneys."

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In the Supreme Court of the United States

No. 497.
OCTOBER TERM, 1964.

JOHN RUFFALO, JR.,
Petitioner,

vs.

THE MAHONING COUNTY BAR ASSOCIATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF OHIO.

BRIEF OF RESPONDENT IN OPPOSITION.

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ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF OHIO.

BRIEF OF RESPONDENT IN OPPOSITION.

Now comes the Mahoning County Bar Association, respondent in the above case, and moves to dismiss the petition for writ of certiorari on the grounds that no jurisdiction attaches for the following reasons:

(A) The three questions presented by petitioner were not timely or properly raised in the state court proceedings;

(B) The three questions presented by petitioner are so unsubstantial as to need no further argument.

REASONS FOR DENIAL OF THE WRIT.

THE THREE QUESTIONS PRESENTED BY PETITIONER WERE NOT TIMELY OR PROPERLY RAISED IN THE STATE COURT PROCEEDINGS.

"QUESTIONS PRESENTED.

1. Does suspension of a lawyer from the practice of law because he has made occasional advances of funds to needy clients in cases under the Federal Employers' Liability Act deny to such lawyer, or the class of clients he represents, rights, privileges, or immunities protected by the Federal Employers' Liability Act or by the Fourteenth Amendment to the Constitution of the United States?

2. Does suspension of a lawyer from the practice of law because he had had in his employ, to assist him in prosecution of cases under the Federal Employers' Liability Act, an investigator who was also employed in a different capacity by a railroad, deny to such lawyer, or the class of clients he represents, rights, privileges, or immunities protected by Section 10 of the Federal Employers' Liability Act or by the Fourteenth Amendment to the Constitution of the United States?

3. Does suspension of a lawyer from the practice of law on the basis of a judicial construction of the canons of ethics which could not fairly have been anticipated deny to such lawyer the right to pursue his calling without due process of law, in contravention of the Fourteenth Amendment to the Constitution of the United States?"

It is noted that the petition for writ of certiorari makes numerous references to constitutional questions raised in briefs filed with the Board of Commissioners on Grievances and Discipline and the Supreme Court of Ohio. Not only do these references fail to reveal that a Federal question was raised timely, properly, or with precision, but also

this Court has held that briefs are not part of the record for the purpose of raising a Federal question. *Lynch v. N. Y. ex rel. Pierson*, 293 U. S. 52 at 54, 55 S. Ct. 16, 71 L. ed. 191; *Live Oak Association v. Railroad Commission*, 269 U. S. 354 at 357-358, 46 S. Ct. 149, 70 L. ed. 305; *Harding v. Illinois*, 196 U. S. 78 at 84, 25 S. Ct. 176, 49 L. ed. 394.

In *Oxley Stove Co. v. Butler County*, 166 U. S. 648 at 655, 17 S. Ct. 709, 41 L. ed. 1149, this Court held:

> "* * * the jurisdiction of this court to re-examine the final judgment of the state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right." See also, *Godchoux Co. v. Estopinal*, 251 U. S. 179 at 181; *Beck v. Washington*, 369 U. S. 541, 8 L. ed. 2d 98, 82 S. Ct. 955, reh. den. 370 U. S. 965, 8 L. ed. 2d 832, 82 S. Ct. 1575.

It is submitted that petitioner has not complied with the above quoted rule. It is not sufficient to raise a constitutional or federal question by brief only. The first time and place in which petitioner specified a violation of any Federal Constitutional right was at pages 1 and 2 of his brief before the Supreme Court of Ohio.

For this Court's convenience with respect to petitioner's failure to introduce a federal question, we now cite the closing remarks of counsel for petitioner before the Board of Commissioners on Grievances and Discipline.

> "Mr. Haynes: You bet we rest, your Honor.
>
> Chairman Beirne: Case submitted. Mr. Grieser, you said you wanted to make some comments at the conclusion of this case?
>
> Mr. Grieser: It's late, and what I want to do is simply to outline my position. Now, if the other side will agree that I can make the same position in writ-

ing, I will be glad to do so, because I merely want to make sure the record is complete with respect to our various motions and our positions, and this is especially true since my examination of the procedure under the rule led me to believe that there is no preliminary procedure to test any of these things as a matter of law, and that simply by answer you have to raise the issues that you expect by way of defense, whether they be of law, whether they be ordinarily one that you would raise by demurrer or otherwise, and for that reason I would like at least to go through these Specifications step by step, unless it can be agreed here that I can raise the same questions as a matter of law in the brief.

Mr. Haynes: Gentlemen, we will offer no technical objection of any kind.

Judge Middleton: All right. Would you let him say—

Mr. Haynes: Sure. Let him say it, certainly.

Mr. Grieser: In other words, let me be clear on this. I don't want to waive anything. I have quite a few objections to the admission of certain testimony. I believe that some of these Specifications should be stricken as a matter of law; I believe some of them should be stricken because of insufficient evidence; I believe some should be stricken because of no evidence; I believe some of them should be denied because they are not supported, where the proof has not been reached, which is the preponderance of evidence; and a few of them, particularly the first one, I think, as a matter of law should be stricken.

Now, I merely say at this late hour, if I am permitted to do that in a formal statement as an opening for my brief, I will do so.

Chairman Beirne: We are perfectly willing tc hear you now, if it is understood this is not an extended argument. You merely want to get whatever objections you have in the record?

Mr. Haynes: I want to know where we stand,

your Honors. We rested here quite some time ago on the ten Specifications. Weren't all the objections made to them at that time? How can we come as far back as on the tenth?

Chairman Beirne: Well, I don't know. I can't anticipate what he is going to say, so I can't very well answer the question.

Mr. Haynes: I ask that he confine himself to 11, 12, 13, and 14.

Judge Middleton: Doesn't he have the right to argue the sufficiency of the record with respect to all of them?

Chairman Beirne: I think so.

Mr. Haynes: They waived argument at the end of the taking of testimony.

Chairman Bierne: We are willing to hear what he has to say. I think it might help us in making up our own minds. If there is something we overlooked, we want to know what it is.

Mr. Grieser: Unless there has been a complete misunderstanding, it was my understanding that at the end of the evidence the Defense has the right to make motions and raise issues of law.

Chairman Beirne: That's right. We will be glad to hear you, Mr. Grieser.

Mr. Grieser: First of all, with respect to Specification No. 1, we move that this Specification be dismissed as a matter of law.

The grounds for our motion are in the amended answer, and in addition, I would like to say that the entry of private reprimand and plea of nolo contendere was unauthorized by the Statutory proceedings governing the Common Pleas Court at that time, or, to turn it the other way around, the Common Pleas Court was unauthorized and without jurisdiction, because at that time the Ohio Supreme Court rule assuming exclusive jurisdiction had been promulgated.

I might say that I would like an opportunity to

brief the law on that, because I don't think really I have the time to go into all the law and all the facts here this afternoon.

Chairman Beirne: I think maybe we can shorten some of these, perhaps not all of them. On that the Panel is of the opinion that the Specification of misconduct in 1 does not state a charge of misconduct under the rule, and, therefore, that motion will be granted.

Mr. Grieser: Thank you, sir.

Chairman Beirne: Now, I want to say this: That this Panel, as all the Panels, does take into consideration any prior charges against a Respondent, not for the purpose of determining whether or not he is guilty or innocent of the case before the Panel, but in determining, if they find he is guilty of any charge, what should be the recommendation so far as discipline is concerned.

Mr. Grieser: In that connection I do want again to call the attention of the Panel to the fact that I do believe that this was an unauthorized entry, if it is called an entry, of private reprimand. It can't be any more than that; it can't be an entry of public reprimand.

Chairman Beirne: Well, you can't question the Court's records. You are proposing we go back to the Court's records, but this was an action taken by the Court, whether it was authorized or not.

Mr. Grieser: I agree with that, but the Panel can and indeed must go to the jurisdiction and power of the body entering or making the entry at the time, as to whether the entry in all its parts was authorized and was under the jurisdiction of the Court.

The Specification No. 2, preliminarily—and I am going to group all these together, whether they have been made before or not, because I think it makes it much simpler here—Respondent moves that the testimony of Clara Beighley and Olive Beighley be stricken from the record on the ground that this Panel

was not authorized to take testimony in a foreign jurisdiction, and that if by any stretch of the imagination, the proceedings over there could be called a deposition, the formalities of notice, and so forth, with respect to the deposition which apply to these proceedings were not complied with.

Chairman Beirne: The motion on that will be overruled, because there was no objection made until this witness had testified, not only on direct examination, but a substantial amount of testimony was given on cross examination. That was when the motion was first made.

Mr. Grieser: Well, I will have to take my exception to that and make my answer to that. I don't believe, whether an objection is made or not, that the inherent jurisdiction or authority is waived by failure to object at the time and place.

Chairman Beirne: No, sir.

Mr. Grieser: Now, with respect to Specification 2, we make the motion that the Panel should deny this Specification in any event, on the ground that the proof was not met by a preponderance of evidence.

Chairman Beirne: Pardon me. Are you still referring to 2?

Mr. Grieser: Specification 2.

Chairman Beirne: That will be overruled, because that will go to the weight of the evidence.

Mr. Grieser: Specification 3: We move that this Specification be denied for the same reason.

Judge Middleton: Insufficient evidence?

Mr. Grieser: Insufficient evidence.

Chairman Beirne: That will be overruled for the same reason.

Mr. Grieser: Specification No. 4 has been stricken, it is my understanding.

Chairman Beirne: That is Rakestraw?

Mr. Grieser: No.

Mr. Haynes: Cotellesse. That is true. It has been stricken.

Chairman Beirne: It has been stricken. There was no evidence offered to support it.

Mr. Grieser: Specification No. 5: We move to dismiss that Specification as a matter of law, on the grounds that the Relator's own witness and their own evidence with respect to this specification was insufficient as a matter of law to support the charge—

Mr. Haynes: We will dismiss No. 5.

Mr. Grieser: All right.

Chairman Beirne: So the motion is granted on that.

Judge Middleton: By consent.

Chairman Beirne: By consent of both parties.

Mr. Grieser: Specification No. 6: We move to dismiss that specification for a total lack of evidence to support this charge in any way.

Mr. Haynes: We will dismiss No. 6.

Chairman Beirne: That is granted by consent of the Relator.

Mr. Grieser: Specification No. 7: We move to dismiss that specification as a matter of law, on the ground that the evidence fails to show any activity that was in any way connected with or to the knowledge of or instigated by the Respondent. This relates to Marie Rakestraw, and the only evidence there concerned a Mr. McKinney, and the evidence is uncontradicted that Mr. McKinney had never mentioned Mr. Ruffalo.

Judge Middleton: That is No. 7?

Mr. Grieser: Yes, sir. Now, I am not saying that is on the weight of the evidence. This is on a total lack of evidence.

Chairman Beirne: That will be granted. I might say, gentlemen, that is granted on the ground that there was no competent testimony that McKinney had authority from the Respondent, Ruffalo.

Mr. Grieser: Right. Now, with respect to Specification No. 8, let us go to 8(C) first. I understand that that has been stricken.

Chairman Beirne: 8(C) is stricken, that is correct.

Mr. Grieser: And Specifications 8(a) and (b) we move to dismiss as a matter of law, on the grounds that the charges and the evidence do not constitute misconduct within the definition of the Ohio Supreme Court rule.

Chairman Beirne: That will be overruled.

Mr. Grieser: And I might say I will brief that point very thoroughly for the Panel.

Chairman Beirne: That, incidentally, is the one that goes to the question developed in the Ethics Committee of the American Bar Association, as referred to by Mr. Ruffalo.

Mr. Grieser: Yes, under Canon 10.

Chairman Beirne: Yes.

Mr. Grieser: Under Canon 10, yes.

With respect to Specification 9, we move to discharge 9 on the ground of insufficient credible evidence.

Chairman Beirne: That will be overruled for the same reason as our reason on 8(a) and (b).

Mr. Grieser: With respect to Specifications Nos. 10, 11, and 12, we move that they be denied on the ground that Relator has failed to meet the burden of proof.

Chairman Beirne: That is overruled.

Mr. Grieser: I might say, of course, that that probably goes to the ultimate finding of the Panel, and I will brief that. In other words, this concerns argument on fact and evidence.

Judge Middleton: That is all three, 10, 11, and 12?

Mr. Grieser: That is correct.

Chairman Beirne: That's right, because you still have Medure's testimony and the Respondent's testimony.

Mr. Grieser: I don't want to mislead the Panel, and I want you to know exactly where we are headed.

We will argue that out on the facts and on the evidence, 10, 11, and 12.

No. 13: We move to dismiss that specification as a matter of law. And I want your Honors to consider this very carefully when I brief it, on the ground that the facts as stated, as distinguished from the conclusions reached by the Relator, do not constitute misconduct under the Ohio Supreme Court rule.

Chairman Beirne: No, that is not the question raised. What Orlando did was work with Respondent in connection with cases that the Respondent had as Counsel against the B. & O. Railroad—

Mr. Grieser: Some of those cases, yes.

Chairman Beirne: —at the same time that Orlando was employed by that railroad. There is no question of fact on that.

Mr. Grieser: There is no question on that, and I am prepared to, I think, demonstrate that as a matter of law that does not constitute misconduct on the part of the Respondent.

Chairman Beirne: And you will put that in your brief?

Mr. Grieser: Yes, sir.

Chairman Beirne: Well, on that, then, we will reserve ruling until we have read your brief on that question. So that is about the only one I know of that we haven't ruled on.

Mr. Grieser: With respect to Specification No. 14, we move to dismiss this as a matter of law on the ground—well, I just simply renew my motion. We move to dismiss this on the ground that as a matter of law there is no evidence in support of Specification No. 14, no competent evidence whatsoever.

Chairman Beirne: We will take that under advisement."

We have had printed as Appendix A, the Findings of Fact, Conclusions of Law, and Recommendations of the Board of Commissioners on Grievances and Discipline of

the State of Ohio so that this Court may appreciate the full consideration given petitioner by said Board. Not a Federal Constitutional question was raised or a Federal Statute invoked. We believe it only fitting that this Court should read especially Charge No. 1, although it was dismissed by said Board. It clearly shows the petitioner not to have been a "novice" in the undertaking of violating the ethics of the legal profession.

Said Charge No. 1 shows petitioner to have been reprimanded January 21, 1957 and the Supreme Court of Ohio with respect thereto made certain comments as to his general character, which are as follows and as quoted from page 41 of the petition for writ of certiorari:

> "This is not the first time that respondent's conduct as a member of the bar has been questioned and found improper. After he was found 'guilty of unprofessional conduct in his office as an attorney at law * * * in that he did by and through duly authorized agents and employees solicit professional employment from sundry people' and was disciplined *therefor in 1957, he showed a contempt for the court,* which made that finding and provided a very lenient discipline for his misconduct. Although he admittedly was well able to pay the costs amounting to several hundreds of dollars and had been ordered by that court to 'pay the costs of this proceeding within 30 days,' he neglected to make any effort to pay them until shortly before the first hearings in these proceedings more than five years later."

Counsel for respondent states to this Court professionally, that the costs were paid a few minutes before the hearing before the Board of Commissioners on Grievances and Discipline started in this instant case.

CONCLUSION.

From the foregoing it is the position of respondent, the Mahoning County Bar Association, that petitioner did not timely or properly raise a Federal question in the Supreme Court of Ohio with such precision that it was apparent that he intended to assert a Federal right. Certainly this was not apparent to the Supreme Court of Ohio, for it did not decide any Federal issues. In addition, petitioner has not presented any question in his jurisdictional statement which is substantial or which has not been previously raised in this Court in cases pending on certiorari from the Supreme Court of the State of Ohio; especially the two most recent cases, *Kenneth Agee, Appellant v. The Columbus Bar Association*, Case No. 259, October Term of 1963; and likewise, during the same term, *Stanley Juris, Appellant v. The Columbus Bar Association, Appellee*. Writs of certiorari in both of these cases were dismissed for the reason that it was held by this Court it was without jurisdiction in this type of case. For these reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

DAVID C. HAYNES,
Counsel for Respondent,

COMUS M. BEARD,
Counsel for Respondent.

APPENDIX A.

BEFORE THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE OF THE SUPREME COURT OF OHIO.

CASE NO. 75.

IN RE
COMPLAINT AGAINST JOHN RUFFALO, JR.,
Respondent,

VS.

MAHONING COUNTY BAR ASSOCIATION,
Relator.

Findings of Fact, Conclusions and Recommendation of Board of Commissioners.

This matter came on for the consideration of the Board of Commissioners on Grievances and Discipline on the report of the Hearing Panel, the transcript of the record including the evidence and proceedings before the Panel and the briefs of counsel for the Relator and the Respondent, all of which have been duly and fully considered by the Board and upon consideration thereof, the Board makes the following findings of fact, conclusions and recommendation:

The Respondent, John Ruffalo, Jr., was admitted to the Bar of the State of Ohio in August 1946 and has practiced since that time in Youngstown, Ohio.

CHARGE NO. 1.

It is charged that on Monday, January 21, 1957, the Respondent entered a plea of nolo contendere and was found guilty of unprofessional conduct in his office as an attorney, in that he did by and through authorized agents

and employees, solicit professional employment from sundry people; that Respondent was privately reprimanded and promised that he would never solicit professional employment again and that the costs of the action in the sum of Four Hundred Ninety Dollars ($490.00) were assessed against him but had not been paid by him as of September 6, 1962.

A certified copy of the journal entry of the Common Pleas Court of Mahoning County entered January 21, 1957 was introduced in evidence to support the charge together with the unpaid cost bill. According to the Respondent the costs were paid by him on December 26, 1962, the first day of the hearing by the Panel. Objection was made to the introduction of the certified copy of the complaint and objection is made to Charge No. 1, in the Respondent's answer, on the ground that the specification is not relevant or material to the proceeding and on other grounds.

CONCLUSION.

The Panel concluded this specification did not state a charge of misconduct within the meaning of Rule XXVII and it was dismissed.

CHARGE NO. 2.

It is charged that the Respondent solicited employment from Mrs. Clara Beighley, New Castle, Pennsylvania, in a claim against the Baltimore & Ohio Railroad Company by reason of the death of her husband, Clyde Beighley, who was a conductor employed by the railroad and was injured on March 4, 1957 and died on June 16, 1957; that approximately two or three weeks following his death, Respondent personally called at said widow's home to solicit professional employment from her for the purpose of prosecuting her claim by reason of her husband's death.

The evidence to support this charge consists of the testimony of Mrs. Clara Beighley, the widow of Clyde E. Beighley, deceased, and her daughter-in-law, Olive Beighley, which was given before the panel on the evening of Wednesday, December 26, 1962 at the residence of Mrs. Clara Beighley in New Castle, Pennsylvania, counsel for both parties and the Respondent being present. According to Mrs. Beighley, the Respondent and a Mrs. Colina (otherwise referred to as Mrs. Colange), came to Mrs. Beighley's home in New Castle, introduced themselves to her and Mrs. Colina, said they wanted to talk to her about her husband's case. They talked it over and Mrs. Beighley gave Respondent the case. She denied that she had sent for Respondent or that she was otherwise acquainted with him before he appeared at her home with Mrs. Colina. Subsequently, Mrs. Beighley went to Respondent's office at his request, being driven there by her son and employed him and she signed an employment contract on July 23, 1957 (Respondent's Exhibit 7). The case was eventually settled for $1,500.00 but Mrs. Beighley received none of the proceeds of the settlement because Respondent told her that she owed him that much because of advances in the amount of $50.00 each which the Respondent had made to her from time to time. Respondent himself testified that the total amount of these advances was $1,025.00 over the period of four years when he was representing her.

On June 15, 1962, the Respondent and his counsel and office associate, Ferdinand R. Montani, came to New Castle to see Mrs. Beighley and talked to her about a claim of $500.00 being made by the railroad for a refund of that amount due for railroad retirement payments. Both the Respondent and Mr. Montani testified about the visit to Mrs. Beighley's home on June 15, 1962 and discussing with her the claim for the refund of $500.00 and advising

her not to worry about it and that she didn't have to pay it. Although there was no evidence as to the interval of time between the conclusion of Mrs. Beighley's case and the visit of June 15, 1962, it appears from the record that there was a substantial period of time that elapsed and that the actual purpose of the Respondent and his associate in making this visit was to talk to Mrs. Beighley about the investigation by the Bar Association of Respondent's activities. On this point, Mr. Montani testified that at the meeting of June 15, 1962, Mrs. Beighley stated that "she made the statement that her friend, Mrs. Colange, had brought you over to her." Mrs. Beighley denied that she knew Mrs. Colina (Colange) before she first appeared at her home in July, 1957 with the Respondent. The Respondent called a Dominic Dimeco of New Castle, Pennsylvania, Mrs. Colina's son. He testified his mother's real name is Mary Colangelo but she is now deceased and that she did know Mrs. Beighley and that he drove his mother to Mrs. Beighley's home in July, 1957 and heard Mrs. Beighley tell his mother that Mrs. Beighley wanted to see Respondent. Dimeco explained that the Respondent had represented his step-father in 1952 in an injury case, but he admitted that his mother did not know Mrs. Beighley until two days before he took her to see Mrs. Beighley. While Mr. Montani testified that when he and the Respondent talked to Mrs. Beighley on June 15, 1962 at her home, Mrs. Beighley stated she had known Mrs. Colange from having played bingo with her, Mrs. Colange's son, Dom Dimeco, admitted that as far as he knew, his mother did not know Mrs. Beighley before June 14, 1957.

Mrs. Beighley's daughter-in-law, Mrs. Olive Beighley, merely testified about the occasion when Mr. Montani and the Respondent called on her mother in 1962 and discussed

the $500.00 refund claim being made by the railroad and another occasion after that when the Respondent attempted to see Mrs. Beighley.

Mr. James A. Wright, Attorney, Pittsburgh, Pennsylvania, testified that he had been associated with the Respondent in court in the Beighley case and that because they were unable to obtain any medical evidence, it did not appear that the case could be successfully prosecuted.

The Respondent objected to the manner in which the testimony of Mrs. Beighley was taken on the ground that it was being taken out of the state and that the witness was hostile. The objection of counsel was not made until he had concluded his cross-examination of Mrs. Beighley.

The Respondent denied that he solicited Mrs. Beighley's claim against the railroad and testified that he was called by Mrs. Colangelo (Colina) who said she was a friend of Mrs. Beighley and that Mrs. Beighley wanted to talk to him about her case and that the appointment to see Mrs. Beighley was made through Mrs. Colangelo. He explained that he knew Mrs. Colangelo from having represented her husband in a case against the Pennsylvania Railroad which was settled for $20,000.00 and that they were pleased with his work.

CONCLUSION.

The Panel concluded it would not consider the merits of the evidence submitted in support of this specification for the reason that an objection was made by the Respondent, perhaps belatedly, to the Panel's taking the testimony of Clara Beighley and her daughters outside the state of Ohio. Since the Panel felt there was sufficient question in this regard no conclusion was made on this charge. The Board concurs in this action.

CHARGE NO. 3.

It is charged that the Respondent, acting through an authorized agent, solicited the claim of Mrs. Naomi Mae Clark against the Baltimore and Ohio Railroad Company by reason of the death of her husband, Major Robert Clark who died August 13, 1957 in an accident while employed as an engine house laborer for the Baltimore & Ohio Railroad.

Naomi Clark testified that her husband had worked for the Baltimore & Ohio Railroad in New Castle and that he died on August 13, 1957 and that two weeks after her husband's death, Elijah Doster came to see her and told her that the Respondent wanted her case. She further testified that she knew of the Respondent and that a Mr. Orlando and others had talked to her about a week after her husband's death and one of those who had seen her gave her the Respondent's telephone number. She said that Elijah Doster told her that the Respondent was the man to employ and that he was also handling Elijah Doster's claim against the railroad.

It appears that Mrs. Clark had known Elijah Doster for a period of approximately twenty-one years. She testified that arrangements were made through Mrs. Betty Orlando, the sister of Michael Orlando, to meet Respondent in New Castle and that she did meet him there. Betty Orlando is the sister-in-law of Michael Orlando who was an employee of Respondent and also the Baltimore & Ohio Railroad. On September 3, 1957 Mrs. Clark signed a contract employing Respondent to represent her. The contract (Respondent's Exhibit 4) is a printed form which recites in the printed portion that

> "I, the undersigned, do hereby retain John Ruffalo as my attorney, acting only upon by own free will with-

out the inducement or solicitation of any person or persons * * *."

Mrs. Clark testified that she had been told by Elijah Doster that the Respondent would let her have money if she needed any during the time he would have her case, and that when she saw the Respondent in September, 1957 he told her that if she needed money he would give it to her. Mrs. Clark's case was settled on November 18, 1960, for $21,000.00, and the Respondent advanced approximately $600.00 to her from time to time before the settlement.

Elijah Doster testified that he had employed Respondent to represent him in a claim against the Baltimore & Ohio Railroad and that while his case was pending, Respondent called him and asked him to talk to Naomi Clark about her case against the railroad, and that pursuant to this request he did talk to Mrs. Clark about employing the Respondent. Doster testified that Angelo Medura phoned him the day before the hearing by the Panel and requested him not to come to court. It also appears that more than a year after Doster's case was settled, the Respondent contacted Doster and gave him $50.00 as a refund for medical fee which related to Doster's case against the railroad. Doster executed a receipt for the fee, dated July 14, 1961 (Respondent's Exhibit 1) and a year later on June 20, 1962 signed a statement for the Respondent (Respondent's Exhibit 2) to the effect that the $50.00 paid to Doster by Ruffalo "was given to me solely as a refund of the medical bill incurred by an examination of Dr. Robinsteen. Dr. Robinsteen died and was unable to appear for me, requiring me to obtain other doctors * * *." This statement was witnessed by Doster's son, Samuel Doster.

On July 14, 1961, the same day on which Doster was requested to sign a receipt for the $50.00, he also signed an

affidavit at the Respondent's office, which affidavit was prepared by the Respondent (Respondent's Exhibit 6). This affidavit recites that

> "Elijah Doster, after first being duly sworn, according to law, deposes and says that at the request of Mr. Ruffalo, he recommended John Ruffalo of Youngstown, Ohio, to Naomi Clark, that he contacted Gordy Marks of Newcastle, Pennsylvania, the brother-in-law of Naomi Clark, who spoke to her about Mr. Ruffalo, and that he learned a few days after that that Naomi Clark had gone to see Mr. Ruffalo, that after his original contact with Mr. Marks, he had talked with Naomi Clark and she informed him that she had gone out to see Mr. Ruffalo, * * * and that it was upon the recommendation that he had made that she came to see Mr. Ruffalo."

When Respondent was testifying on his own behalf he admitted he asked Elijah Doster to recommend Respondent to Naomi Clark, but says this was done "about 15 or 20 minutes before I had any—before I represented her." (751.)

Sam Doster testified that he heard his father state to Mr. Ruffalo that he saw Mrs. Clark at Mr. Ruffalo's request.

It also appears that contact was made by Respondent and Angelo Medura of Newcastle, Pennsylvania, with Sam Doster, relating to the question of Elijah Doster's appearance to testify before the Panel, and that Sam Doster was given $5.00 by Medura and a bottle of Respondent's whiskey. This took place at a meeting between Youngstown and Newcastle on December 24, 1962.

At the original hearing held by this Panel in December, 1962, Sam Doster testified about a discussion between himself and Medura, at this meeting, concerning a charge of homicide then pending against Sam Doster in Pennsyl-

vania. According to Sam Doster, Medura told him that he knew it would cost quite a fee "And he said 'You know that John just can't do it himself,' that 'Whatever you need,' that 'I'll get in touch with John for you, and he would give it to me to give you.'" He further testified that this conversation took place outside of the Respondent's car while Respondent was sitting in the car. However, at a subsequent hearing held by the Panel on August 16, 1963, the same Sam Doster was called to testify on behalf of the Respondent. At this hearing he testified that he lied at the previous hearing; that Medura had offered him nothing to persuade his father, Elijah Doster not to appear at the hearing before the Panel.

Doster said he'd decided to tell the truth because he realized his testimony at the previous hearing had damaged Respondent and he didn't feel right about it. He said he'd lied because he thought the Respondent had not represented his father properly and had been so informed by some representatives of the American Railroad Association. He could not explain why he decided, since the December hearing, to change his story. Since the December hearing, he was tried on the homicide charge in Pennsylvania and found guilty. He was out on bond at the time of the August hearing. Whether this had anything to do with the change in this witness' story was not shown. Because of this recantation by Sam Doster of his testimony at the preceding hearing, the Board has placed no credence whatever in this witness' testimony, given either at the preceding hearing or at the present hearing.

At the hearing in December, 1962 the Respondent offered a tape recording of a conversation between the Respondent and his associate, Mr. Montani, with Elijah Doster. Although the recording was played at one of the hearings held by the Panel, it was inaudible. At the last

hearing held on August 16, 1963, the Respondent produced David Burton, a free lance court reporter, who testified that there had been submitted to him a transcript of the tape recording, which had been prepared by the Respondent's secretary, and that the witness compared this transcript with the recording and corrected the transcript in several respects. The witness' transcript was then offered in evidence as an exhibit. However, the Panel sustained the objection to this exhibit and the Board has given it no consideration for the reason that a witness' testimony concerning his interpretation of a tape recording of a conversation with another witness violates the hearsay rule and the rule excluding the opinions of witnesses except in certain defined exceptions of which this is not one.

The Respondent testified that he was first contacted about the Naomi Clark case, by Mrs. Alexander Orlando, Mike Orlando's sister-in-law, on September 30, 1957, when he had returned from a vacation, and that Mrs. Orlando said that she was a friend of Naomi Clark and that Naomi Clark wanted to see him and he suggested that Miss Clark come to see him, but Mrs. Orlando told him she couldn't come and suggested that the Respondent come to Mrs. Orlando's home. Respondent said that he had never known Mrs. Orlando before, although she was the sister-in-law of Mike Orlando, who was then an employee of the Respondent.

Mrs. Lois Scopio, Michael Orlando's sister, testified that she was a bookkeeper at a store in Newcastle where Naomi Clark had purchased a coat, and that Naomi Clark had no money to pay for the balance due on the coat, and in the course of the conversation about her account she asked the witness whether she had ever heard of the Respondent, and then asked the witness to call the Respondent, which Mrs. Scopio said she did, but was un-

able to reach him because he was on a vacation. She testified that Naomi Clark subsequently told her that she had talked to Betty Orlando, Michael's sister-in-law, and had asked her to get in touch with the Respondent.

CONCLUSION.

It is the conclusion of the Board that the evidence with respect to this charge establishes that Respondent was guilty of misconduct in soliciting employment from Mrs. Naomi Clark in violation of Canon 27 of the Canons of Professional Ethics.

CHARGE NO. 4.

The Respondent is charged with soliciting professional employment through one of his agents, Michael Orlando, to represent one Sam Cotellesse, who had a claim against the P. & L. E. Railroad Company for injuries received on August 12, 1958 when he was employed by this company.

CONCLUSION.

No evidence was offered to support this charge and it was, therefore, dismissed by the Panel.

CHARGE NO. 5.

It is charged that the Respondent through his agent, Michael Orlando, attempted to solicit professional representation from one James F. Quinn for injuries received by Quinn on November 22, 1958, while he was working for the Baltimore & Ohio Railroad. The evidence offered in support of this charge was the testimony of Mr. Quinn and also an affidavit of Mr. Quinn (Relator's Exhibit 4). Although Mr. Quinn was called to testify on behalf of the Relator, he denied that Orlando attempted to solicit his claim against the Railroad for the Respondent, and said

that he had known Orlando for forty years and they were both friends, and that Quinn had contacted Orlando and asked Orlando to tell the Respondent that he desired to talk to him about his case against the Railroad. Quinn testified that he did talk with the Respondent but did not employ him. Quinn's affidavit was substantially the same as his testimony.

CONCLUSION.

The Panel concluded the evidence did not support this charge and it was therefore dismissed.

CHARGE NO. 6.

It is charged that the Respondent personally attempted to solicit professional employment of one Andrew Buletko, to represent him in his claim for damages against the P. & L. E. RR Company, arising out of injuries sustained on March 27, 1960, while Buletko was employed by the railroad.

Andrew Buletko testified in support of this charge that he was injured on March 27, 1960, and that while he was in the hospital an attorney came to see him about his case and his name sounded like John Ruffalo, but on cross-examination the witness admitted that he couldn't identify the Respondent as the person who had called on him at the hospital, and said that he had never seen the Respondent before. Buletko further admitted signing a statement for Mr. Montani on September 18, 1962, in which he said he was not sure of the name mentioned to him by the man who came to see him.

Philip Morganti, an attorney practicing in Youngstown, testified that he represented Buletko in connection with this same claim and had been his attorney for a number of years. He testified that Buletko had called him and

told him that Ruffalo had been to see him, and that the name Ruffalo was mentioned by Buletko without any doubt. Later, however, Buletko told Morganti that he wasn't sure whether the name was "Ruffalo, Buffalo, or Tuffalo."

The Respondent testified that the first he knew of Buletko was when Mr. Morganti called him and informed him that the Mahoning County Bar Association was investigating Respondent's activities in connection with the Buletko case. Respondent denied that he had ever been in the hospital at the time that Buletko was a patient there, and denied that he had ever seen Buletko until he went to see him at his home to obtain a statement from him in connection with the charges of the Bar Association.

CONCLUSION.

The Panel concluded the evidence did not support this charge and it was therefore dismissed.

CHARGE NO. 7.

It is charged that the Respondent by and through his agent, one McKinney, attempted to solicit professional employment from Mrs. Mae Marie Rakestraw, in connection with her claim against the Pennsylvania Railroad, by reason of the death of her husband, which occurred in November, 1960.

Mrs. Rakestraw testified that her husband died on November 30, 1960, and that two weeks later Louis E. McKinney came to see her and talked to her about her claim against the railroad; that she told McKinney that she was already represented by Attorney Harold Yost. She testified that McKinney returned several weeks later and told her he represented Attorneys Ruffalo and Wall, and that they were specialists in suits against corporations, espe-

cially railroads; whereas, the attorney representing her, Harold Yost, was a divorce lawyer, and that McKinney produced some papers, including photostatic copies of cancelled checks in settlement of claims against the railroad and that he told her that Ruffalo and Wall were representing Mrs. Schultz in a claim against the railroad. Mrs. Rakestraw knew Mrs. Schultz, whose husband had worked with Mrs. Rakestraw's husband.

Louis McKinney testified that he had done investigating work for Clinton J. Wall, an attorney in Youngstown, and had been employed by him to investigate the Schultz case and went to see Mrs. Rakestraw in connection with that case. He denied that he mentioned Mr. Ruffalo's name to Mrs. Rakestraw or that he had been authorized by the Respondent to contact her.

A deposition of Clinton J. Wall was read into the evidence. He testified that he did represent Helen Schultz in December, 1960, and that he subsequently employed Mr. Ruffalo to handle this case in court for him. Wall testified that he had employed Mr. McKinney to investigate the Schultz case and that to his knowledge the Respondent did none of the investigation.

CONCLUSION.

The Panel concluded that the evidence failed to establish that the Respondent authorized Louis McKinney to contact Mrs. Rakestraw to solicit her claim and this charge was therefore dismissed.

CHARGE NO. 8.

It is charged that the Respondent advanced monies to Clara E. Beighley, Naomi Clark, and Sam Cotellesse while handling their claims, and deducted such advances from settlements of their claims. The uncontradicted evi-

dence establishes that Respondent did advance a total of $1,025.00 to Clara Beighley during the period of time that he represented her, and that he advanced $611.00 to Naomi Clark during the time that he represented her. Respondent's representation of each of these parties extended over a period of several years. Respondent admits that these funds were advanced, but justifies the advances on the ground that they were made as an act of kindness at a time when these clients were in difficult circumstances. No evidence was offered to prove any advances to Sam Cotellesse.

The Legal Ethics Committee of the American Bar Association rendered an opinion, Number 288, on October 11, 1954, to the effect that payments, pending trial in personal injury cases, by an attorney to or for the benefit of his injured client, for any purpose other than to cover expenses of litigation subject to reimbursement, are improper. In reaching this conclusion the committee considered Canon 42 which provides:

> "A lawyer may not properly agree with a client that the lawyer shall pay or bear the expense of litigation; he may in good faith advance expenses as a matter of convenience, but subject to reimbursement."

The Committee also considered Canon 10 which provides:

> "The lawyer should not purchase any interest in the subject matter of the litigation which he is conducting."

Canon 42 refers to expenses which are connected with the litigation such as court costs, depositions and similar expenses. It was the committee's opinion that a lawyer who makes advances to his client for other purposes thereby acquires an interest in the subject matter of the litigation

which he is conducting in violation of Canon 10. The committee also observed that the practice, if publicized, constitutes a holding out by the lawyer of an improper inducement to clients to employ him in addition to the assurance of performing legal services for the client. In other words, such practice can constitute an indirect form of solicitation. The committee observed that the conclusion which it reached is contrary to the conclusion reached by the Supreme Court of Illinois in the case of *State E. R. Chicago Bar Association v. McCallum,* 341 Ill. 578, 173 N. E. 827. Three of the judges of the Supreme Court of Illinois dissented from the conclusion of the majority. The question was considered by Judge Beamer of the United States District Court for the Northern District of Indiana, Hammond Division, on September 26, 1962, in the case of *El Janny v. Cleveland Tankers, Inc.,* 209 F. Supp. 91. Judge Beamer held that a lawyer was not entitled to an order reimbursing him for monies advanced to his client and stated in the opinion:

> "The propriety of the practice of loaning or advancing money to clients in personal injury cases has long been questioned by the courts and the organized bar."

He cited and quoted from Opinion 288 of the Committee of the American Bar Association.

While it may be questioned whether or not an occasional advance or loan by a lawyer to a client constitutes a violation of Canon 10 or Canon 27, it is clear that where such advances are frequently made to various clients over an extended period of time, such practice does establish the violation of Canon 10 in that the lawyer acquires an interest in the subject matter of the litigation which he is conducting, beyond the payment of his fee. Moreover the practice constitutes an indirect form of solicitation in

providing an inducement to seek out such lawyers for employment for reasons unrelated to their professional competence. The facts in the present case establish that the Respondent advanced money to Clara Beighley, Naomi Clark and Andrew Masters in various amounts, which according to Respondent's own testimony totaled $2,936.-00. It further appears that the practice of Respondent in making such advances was known. One of the witnesses, Elijah Doster, testified that when he contacted Naomi Clark about employing Respondent, Doster told her that the Respondent would lend her money if she needed any. Naomi Clark confirmed this testimony. Andrew Masters testified that the subject of advancing money was discussed with Respondent on the first occasion that Masters visited him.

CONCLUSION.

It is, therefore, the conclusion of the Board that the Respondent is guilty of unprofessional conduct in violation of Canon 10 and Canon 27.

CHARGE NO. 9.

It is charged that Respondent promised to advance money and later did advance money to Andrew Masters during the pendency of Masters' case against the Pennsylvania Railroad. The evidence establishes that there was a discussion between Respodent and Masters about the advancement of money to Masters at the time Masters first saw Respondent and signed his contract of employment on May 29, 1958 (Respondent's Exhibit 10), and that Respondent advanced monies to Masters on fifteen separate occasions in a total of over $1,200.00 during the period Respondent was representing Masters.

CONCLUSION.

It is the conclusion of the Board that Respondent is guilty of unprofessional conduct in violation of Canon 10 and Canon 27 of the Canons of Ethics.

CHARGE NO. 10.

It is charged that Respondent is guilty of unprofessional conduct in atempting to influence Elijah Doster in that he endeavored to have Doster sign a false statement that Doster had not been contacted by the Respondent in an effort to have Doster help in the solicitation of the case of Naomi Clark; that at the time Respondent attempted to take said false statement from Doster he paid him the sum of $50.00 in cash. Some of the evidence in support of this charge is discussed in connection with Charge No. 3 pertaining to solicitation by Doster on behalf of the Respondent of Naomi Clark's case. The evidence does establish that on or about July 14, 1961, Respondent prepared an affidavit which Elijah Doster refused to sign until it was corrected, but there is no evidence as to the contents of such affidavit and, therefore, it cannot be said that the Respondent attempted to have Doster sign a false affidavit. However, the evidence does establish that on the same date Respondent paid $50.00 to Doster and requested him to sign the affidavit, an investigation was being made by a Mr. White of the American Association of Railroads relating to Respondent's activities in suspected solicitation of claims. The payment by Respondent to Doster on that date was obviously for the purpose of influencing Doster as a prospective witness.

CONCLUSION.

It is the conclusion of the Board that the Respondent was guilty of misconduct in attempting to influence Elijah Doster by the payment of $50.00 to him, in violation of Canon 29 and Canon 32 of the Canons of Professional Ethics.

CHARGE NO. 11.

It is charged that on Christmas Eve, December 24, 1962, the Respondent attempted to intimidate Samuel Doster who was to appear before the hearing panel, by approaching him at Lincoln Knolls Bowling Alley on Route 422 in Youngstown, to prevent him from appearing as a witness by offering him sundry considerations; that the Respondent gave Sam Doster a fifth of whiskey and $5.00 for the purpose of prevailing upon him to prevent his father, Elijah, from appearing as a witness.

The evidence with respect to this charge was received above in connection with the consideration of Charge No. 3 relating to Naomi Clark's claim. The evidence is uncontradicted that the Respondent and Angelo Medura did have a meeting with Samuel Doster on Christmas Eve, December 24, 1962, which was after the Respondent received notice of the hearing scheduled by the Panel for December 26, 1962. Respondent said that he merely talked to Sam Doster and asked him to request Sam Doster's father, Elijah, to tell the truth. He denies attempting to influence Sam Doster. It is nevertheless a fact, as testified to by Angelo Medura, that the Respondent did contact Medura for the purpose of having Medura talk to Andrew Masters and that Medura did contact Andrew Masters in connection with the charges pending against Respondent, and that the Respondent was also with Medura for the

purpose of talking to Sam Doster. At this meeting Medura did in fact give Sam Doster $5.00 and a bottle of whiskey which was the property of Respondent. While the evidence does not definitely establish that the Respondent was a party to the discussion between Medura and Sam Doster, it is a fact that such discussion took place outside of Respondent's automobile and that Respondent was in the automobile at the time it took place. It is reasonable to infer that whatever discussion took place between Medura and Doster was known to Respondent. Inasmuch as the admitted purpose in seeing Sam Doster was to have him contact his father, Elijah, about his testimony at the hearing before the Panel, it must be concluded that the gifts made to him at this meeting, were for the purpose of influencing him and thereby accomplishing the objective of the meeting. In reaching the conclusion with respect to this charge, the Panel completely disregarded the testimony of Sam Doster given at the original hearing of the Panel in December, 1962, as stated previously in the discussion on Charge No. 3, because this witness recanted that testimony at the hearing held on August 16, 1963 and said that he lied at the December hearing. For the same reason, the Panel disregarded Doster's testimony given at the hearing held on August 16, 1963.

CONCLUSION.

It is the conclusion of the Board that the Respondent is guilty of misconduct as charged and has violated Canon 29 and Canon 32 of the Canons of Professional Ethics.

CHARGE NO. 12.

It is charged that the Respondent, through one or more of his agents acting on his behalf, did attempt to intimidate the witness, Andrew Masters, on or about Sun-

day, December 23, 1962, by having his agent offer Masters the sum of $300.00 to keep him from appearing before the Panel as a witness on behalf of the Relator.

Some of the evidence with respect to this charge is discussed above in connection with Charge No. 11. It does appear from the testimony of Andrew Masters that Angelo Medura called Masters on December 23, 1962, and met him and told Masters that "He had an opportunity to get some beer joint, that Mr. Ruffalo was going to back him up * * *"; that Medura further said "You can get $300.00 and you don't have to appear and you're doing me a hell of a big favor." Medura admits talking to Masters on Sunday, December 23, 1962, at Newcastle about Masters' appearance as a witness before the Panel, and that he saw Masters at the Respondent's request. He denied offering Masters any money and explained that Masters was angry with Respondent because Masters was not satisfied with the verdict which had been obtained and because the Respondent did not appeal the case. Medura does admit stating to Masters "Andy, what are you going to gain by going over to Youngstown to hurt this man."

In view of the fact that Medura had contacted Masters at Respondent's request and had also talked to Sam Doster in the presence of Respondent about being a witness before the Panel in the charges against the Respondent, and had admittedly offered Doster inducements not to appear as a witness, the Board concludes that the evidence supports the charge that Medura did offer Masters a consideration to prevent Masters from appearing as a witness against the Respondent.

At the hearing which the Panel held on August 16, 1963, the Respondent called two witnesses, Joseph Edward Petite and Carl R. Foster, who testified that on December 27, 1962, they had gone to the dining room of the Tod

Hotel in Youngstown at the request of the Respondent, and taken a table next to that which was occupied by Mr. and Mrs. Masters and a Mr. White, who represented the American Association of Railroads, and that during this conversation Masters was overheard telling White that Medura did not offer Masters any money, and that Masters was a friend of Medura's and did not want to hurt him, and White replied that while Masters did not want to hurt Medura he did want to get at Ruffalo, and White told Masters that Masters should go in and testify about being offered $300.00 by Medura. Both of these witnesses admitted that the Respondent had formerly represented them in personal injury cases. They were both unemployed at the time they gave their testimony. They said they occasionally did work for the Respondent. The Relator objected to the testimony of both of these witnesses concerning the conversations which they allegedly overheard between White and Masters. The objection was sustained for the reason that if the purpose of such testimony was to contradict the testimony given by Masters at the previous hearing, it was necessary to lay a foundation for such contradictory testimony by first asking Masters himself about the alleged conversation between him and White. This was not done, and, therefore, the testimony of both of these witnesses wa. nothing more than hearsay. *King v. Wicks*, 20 Ohio 88; *Columbus v. Freeze*, 100 O. A. 37, 59 O. O. 474; 56 *O. Jur.* (2d) 816, Sec. 380.

CONCLUSION.

It is the conclusion of the Board that the Respondent is guilty of unprofessional conduct as charged and has violated Canon 29 and Canon 32 of the Canons of Professional Ethics.

CHARGE NO. 13.

It is charged that the Respondent conspired with Michael Orlando and paid Orlando money for preparing lawsuits against the Baltimore & Ohio Railroad which was Orlando's employer.

The evidence in support of this charge is not in dispute. Orlando worked as an investigator for the Respondent from 1953 to July 19, 1962. During this same period he was also an employee of the Baltimore & Ohio Railroad. He was suspended by the railroad on July 21, 1962 on charges of soliciting claims. A hearing was held on these charges but Orlando did not appear because he says he was in the New Castle Hospital. During his employment with the Respondent, Orlando was paid $25 a day plus expenses and investigated all of the Respondent's railroad cases. He said that he worked an average of ten or fifteen days a month for the Respondent. Withholding slips, Internal Revenue Form 1099, were received in evidence as Relator's Exhibits 7-A, 7-B, 7-C, 7-D and 7-E and showed the following amounts paid to Orlando by the Respondent:

1957—$2,950.00
1958— 1,250.00
1959— 1,237.37
1960— 3,829.25
1961— 4,716.00

According to Orlando, Respondent paid him in cash for which Orlando said he signed receipts. Orlando said that the Respondent kept no records, but paid Orlando on the basis of Orlando's records, but didn't keep these records after his Income Tax returns were filed (R. 641, 654, 655). Respondent stated:

"We worked on that basis for the particular reason that we didn't want this man to be accused of exactly

what he was accused of, which he wasn't doing and which he did not do, but the fact was that I was trying to protect him. He was trying to help me as an investigator. He had certain knowledge, certain abilities that I needed, and I was trying to protect him, and that was the reason that we worked this thing out this way. With any other person that has ever done any work for me, like Mr. Guthrie in my office, or anyone else, I have paid him by check, but particularly for security reasons for this man, that was the reason we worked it this way."

Later Respondent testified that he had no record of payments made to Orlando on his books. He also testified that—

"* * * as soon as they were examined by the Internal Revenue Department, why, we got rid of them, because we didn't want to keep them, because of the fact we didn't want to involve Mike—" (R. 44).

The Respondent was ordered by a subpoena issued by the Board (Relator's Ex. 8) to produce "all your records, checks, disbursements and receipts of any kind or nature showing ayments to Michael Orlando of New Castle, Pa. for the years 1957, 1958, 1959, 1960, 1961 and 1962." Respondent only produced the witholding slips, Form 1099 (Relator's Exhibits 7-A, 7-B, 7-C, 7-D and 7-E above). Respondent was also requested by the Chairman of the Panel to produce all of his records so that counsel for the Relator could determine for themselves whether or not his records contained any entries which would reflect on the payments made by Respondent to Orlando (R. 427, 428, 429). The Respondent did not produce his records and refused to comply with the request of the Chairman of the Panel (R. 596, *et seq.*).

Although the full extent of Orlando's activities in behalf of the Respondent could perhaps be better de-

termined if Respondent had submitted his records for examination as requested by the Chairman of the Panel, there is no dispute about the fact that the Respondent did employ Orlando to investigate cases against the Baltimore & Ohio Railroad while Orlando was working for that railroad. (R. 672, 673.) Furthermore, the Respondent admits that he kept no entries of payments to Orlando so that he would have no record which would disclose the fact that Orlando was employed by the Respondent. The panel questioned the Respondent at length (R. 656, *et seq.*) on his views relating to the practice of employing Orlando to investigate cases against the Baltimore & Ohio, while he was employed by that company. He saw nothing wrong with the practice because he was "doing something altogether different from the type of work he was doing on the railroad" (R. 658). But he admitted employing Orlando because of the advantages in having a railroad man working for him (R. 660). He saw no distinction between employing any railroad employee and one who was investigating claims against his own employer, because "our concepts have changed * * *."

CONCLUSION.

The Board does not agree that "our concepts have changed" with respect to the fundamental principle that an agent cannot serve two masters. In 1881 the Supreme Court decided the case of *Bell v. McConnell,* 37 O. S. 396. In the Opinion in that case, it is stated (399):

> "In law, as in morals, it may be stated, as a principle, no servant can serve two masters, for either he will hate the one and love the other, or else he will hold to the one and despise the other. Luke 16, 13."

The Board concludes that the statement of this moral and legal principle is as valid today as it was 82 years ago

when *Bell v. McConnell* was decided. See also 2 *O. Jur.* (2d) 178, Sec. 118, and 35 *O. Jur.* (2d) 699, Sec. 78.

The Board cannot agree with the Respondent's contention that the principle condemning double-agency does not apply because of the difference between Orlando's duties as a railroader from those as an investigator. The fidelity which the employee owes his employer is the same regardless of any distinction which may be made between the nature of the duties he is performing for his employer and those which others may employ him to perform against his employer.

On page 43 of their brief, counsel for Respondent cite Title 45 U. S. C., Sec. 60 which makes it unlawful to attempt to prevent an employee of a common carrier from voluntarily furnishing information to "a person in interest" as to facts incident to the injury or death of any employee. It is contended by counsel that the provisions of this section of the United States Code make the arrangement between Orlando and Respondent a valid and proper one; that if the Board should hold that the activities of Orlando constitute a basis for discipline of Respondent, such holding would constitute an interference by the State of Ohio with the policy of the Federal law governing the rights of railroad employees under the Act. It is the conclusion of the Board that there is a clear distinction between the action of an employee in "furnishing voluntary information to a person in interest" and those of an employee employed by a lawyer to investigate cases against his employer. There is no provision of the section of the Code which in any way relates to the arrangement which existed between Orlando and the Respondent.

CONCLUSION.

It is the conclusion of the Board that the evidence establishes that Respondent was guilty of misconduct in being a party to a transaction which caused Orlando to breach his duty to his employer, and that by reason of such practice the Respondent was guilty of misconduct as stated in the charge and violated Canon 29 and Canon 32 of the Canons of Professional Ethics.

CHARGE NO. 14.

It is charged that Respondent, through Michael Orlando, solicited the right to represent Amerzia Montgomery and his wife, Mildred Montgomery, in their claims on behalf of their minor daughter, Sheila, for injuries sustained by her on August 26, 1959.

The Panel appeared at Youngstown on July 19, 1963 to hear the evidence with respect to this charge, but a continuance was requested by counsel for the Relator for the reason that the two witnesses, Mildred and Amerzia Montgomery, did not appear although arrangements had been made for their appearance. Because the witnesses were residents of Pennsylvania, they had not been subpoenaed.

The deposition of Amerzia and Mildred Montgomery was taken by counsel for the Relator on July 26, 1963 at Newcastle, Pennsylvania, counsel for both the Relator and the Respondent, as well as the Respondent being present. In substance, both of these witnesses testified that they had seen Mr. Ruffalo and requested him to represent them and that thereafter Michael Orlando had come to their home and requested them to sign some pink paper which was an authorization to inspect traffic accident report at the police department. They denied that Orlando had first appeared at their home to solicit the case for Mr. Ruffalo.

Counsel for Relator cross-examined each of these witnesses whom Relator had called, concerning the contents of affidavits which they had signed. In neither of the affidavits was it stated that they had seen the Respondent before seeing Orlando. In fact, in the affidavit of Amerzia Montgomery it was clearly stated that Orlando had seen Mr. and Mr. Montgomery first about obtaining their child's case for Mr. Ruffalo. Neither of the witnesses gave any explanation as to the marked difference between their testimony at the deposition and the statements in their respective affidavits.

Counsel for the Relator offered the affidavits in evidence but these were objected to by counsel for the Respondent on the ground that the testimony of the witnesses given at the depositions could not be contradicted by the affidavits even though it was proper to cross-examine the witnesses with the aid of the affidavits because counsel for the Relator was taken by surprise. The objection to the introduction of the affidavits was sustained on the authority of *Hurley v. The State*, 46 O. S. 320, and *State v. Duffy*, 134 O. S. 16. Without the affidavits, there was no evidence to support the charge.

CONCLUSION.

It was the conclusion of the Panel that the evidence with respect to this charge fails to establish that Respondent was guilty of misconduct and the Board concurs in this conclusion.

RECOMMENDATION.

It is the recommendation of the Board of Commissioners on Grievances and Discipline that the Respondent be disbarred.